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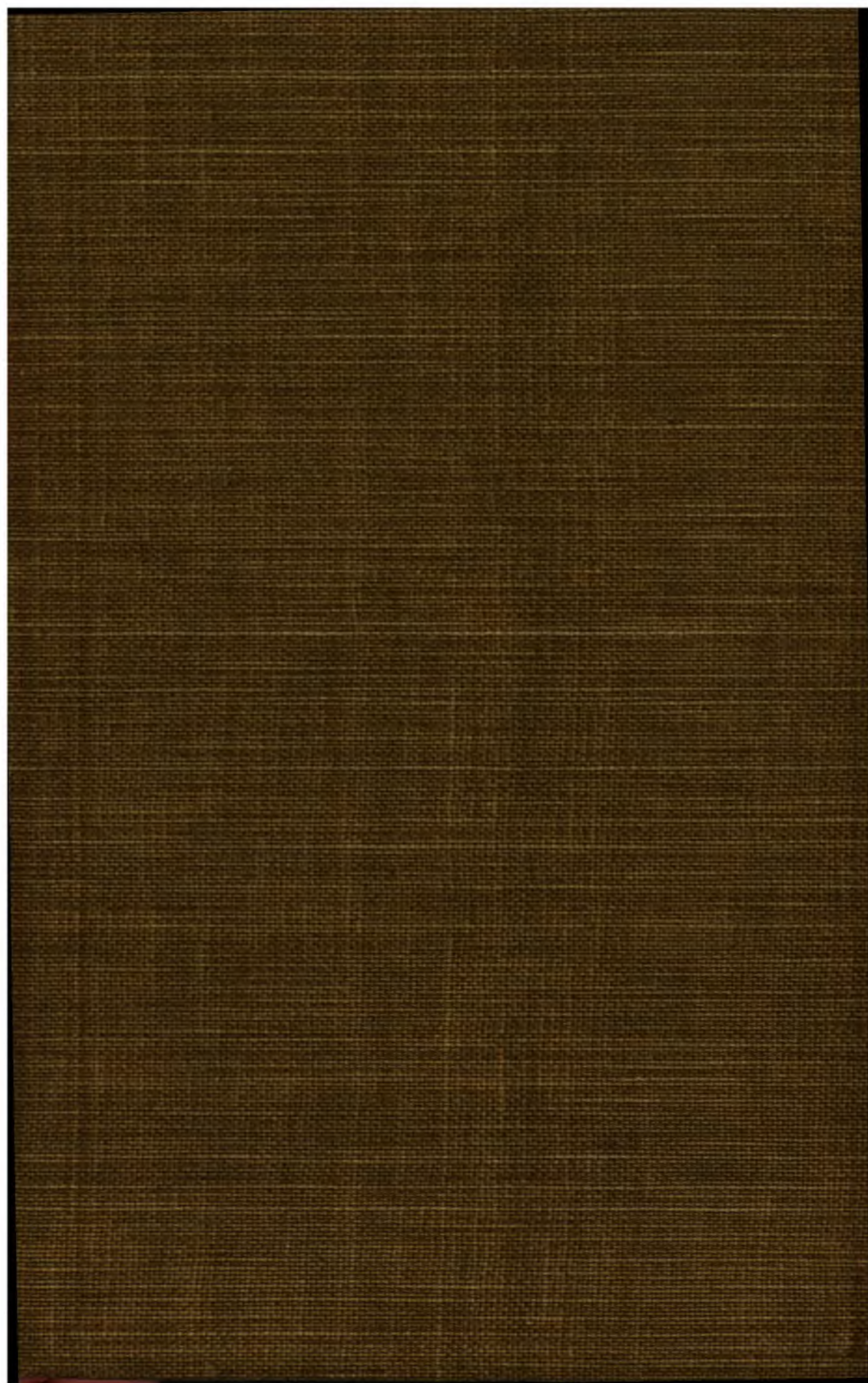
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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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MINING REPORTS.

VOL. X.

COLLIER, Adm'x, v. STEINHART ET AL.

(51 California, 116. Supreme Court, 1875.)

¹**Superintendent with full powers of hiring—Complaint insufficient.** In an action against the owners of a mine for injuries sustained by an employe, occasioned by the negligence of the engineer, the complaint stated that the mining superintendent had full power and authority to employ and discharge servants and laborers at discretion and that the superintendent knew that the engineer was incompetent and negligent before the injury complained of: *Held*, that a demurrer to the complaint was properly sustained, because the complaint contained no averment that defendants were negligent in employing the superintendent.

Appeal from the District Court, Eleventh Judicial District County of Amador.

The complaint alleged that the defendants owned and worked the "North Amador Mine," at Sutter Creek, by and through their superintendent and agent, Clenden, who had full power and authority from the defendants to superintend, direct, manage and control the working and operating of the mine, and to employ any and all servants and laborers in and about the working and operating of the mine, and to discharge them at discretion; and that all the laborers at the mine were employed by the defendants through the superintendent, and that Westlake was the engineer who operated the engine and hoisting tackle used at the mine to hoist the water from the shaft, and that Westlake was incompetent and negligent, and

¹ *Hall v. Johnson*, 9 M. R. 686; *Peterson v. Whitebreast Co.*, 50 Iowa, 673; 32 Am. R. 143.

destitute of ordinary skill in the business, and the defendants and Clenden knew that to be the case before the injury complained of. That on the 18th day of March, 1873, Patrick Collier, an employe, was working in the bottom of the shaft, when, owing to the negligence and want of skill of Westlake, a tub of water fell down the shaft, and Collier was killed. There was no averment that the defendants were negligent in employing Clenden. The plaintiff sued as the administratrix of his estate. The court sustained a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action. The plaintiff declined to amend, and judgment was rendered for the defendants. The plaintiff appealed.

ARMSTRONG & HINKSON, for the appellant.

FARLEY & PORTER, for the respondent.

BY THE COURT.

The demurrer to the complaint was properly sustained. Plaintiff, the appellant, relies on section 1970 of the Civil Code, which provides: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer, in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe."

The complaint alleges that the defendants had no immediate connection with the employment of Westlake, the engineer, or of any other of the laborers, servants or employes, but that Clenden, the superintendent, "had full power and authority to superintend, direct, manage and control the working and operating of said mines, and to employ any and all servants and laborers in and about the working and operating thereof, and to discharge them or any of them *at discretion*, in the name of, for and on behalf of the defendants." This averment is not qualified by the subsequent allegation that all servants and laborers "were under the immediate control and direction of defendants *through their said agent*."

The complaint counts on the negligence and want of skill

of Westlake, the engineer, and that "defendants did not use ordinary skill in selecting said Westlake." But, as we have seen, Westlake was employed by, and was under the direction of Clenden, the superintendent, and there is no averment that the defendants were negligent in selecting and employing Clenden.

Judgment affirmed.

¹KIELLEY v. BELCHER SILVER MINING Co.

(3 Sawyer, 437. U. S. Circuit Court, District of Nevada, 1875.)

A servant takes upon himself the ordinary risks and perils of the service in which he voluntarily engages.

Ordinary risks defined. These ordinary risks include all such as, arising out of the nature of the work, happen, notwithstanding the exercise of due care, and also those arising from the negligence of those of his fellow servants, who are engaged in the same department of the master's general business, and who are not his superiors in authority.

²**Fellow servants in distinct departments.** The rule which exempts the master from liability for injuries caused by one fellow servant to another does not extend to the case of servants serving in distinct departments of the master's general business.

Before Mr. Justice FIELD, and HILLYER, District Judge.

This is a demurrer to the complaint in a suit to recover damages for personal injuries. The complaint states that the defendant is, and was, a corporation, carrying on the business of mining in Storey county; that the plaintiff was employed by the defendant as a laborer in its mine; that at the same time a large number of miners were also employed by the defendant, whose duty it was to excavate in the mine by means of blasts exploded at irregular intervals; that these blasts threw rock and earth in all directions with sufficient force to do great bodily injury to and kill a person struck thereby; that such blasts were put up in and exploded by the said miners; that all persons approaching a blast about to be exploded could have been notified easily thereof and warned of

¹ S. C. at trial, 10 M. R. 11.

² Company responsible to engineer for conductor's negligence: *Chicago R'y v. Ross*, 112 U. S. 377.

the danger, "and it was the duty of the defendant so to do; but not regarding its duty in this respect, it neglected to give plaintiff notice, but carelessly and negligently allowed him, whilst engaged in the employment and discharging his duty in the said mine, to approach so near a point where a blast had been put in by the said miners, employes of defendant, that when the same was exploded by the said employes, this plaintiff was, by reason of the concussion and the rock and earth thrown therefrom striking him in the face and upon the body, greatly injured, his eyesight being permanently destroyed, and he receiving other serious injuries."

The point raised by the demurrer is, that the plaintiff and the persons exploding the blast were fellow servants, engaged in a common employment, though in different branches, and the defendant is not liable to plaintiff for any negligence of his fellow servants, nor from any injury springing therefrom.

LEWIS & DEAL, for plaintiff.

WHITMAN & WOOD, for defendant.

By the Court, HILLYER, J.

That the defendant, as a corporation carrying on the business of mining, is liable for torts, is well settled: *Fowle v. Alexandria*, 3 Pet. 398. And since, as such corporation, it can act by means of agents or servants only, it follows that it is liable to third persons for the tortious acts of its agents and servants. But the servants of a corporation are no more and no less than the servants of a natural person, and in both cases, whatever is negligently done or omitted is, as to the public, the employer's act: 14 How. 468. It is also established law that a master is responsible to his servant for an injury caused by his (the master's) own negligent act. If, then, a corporation can, as master, be directly guilty of a tortious act to the injury of its servant, it is good pleading to charge the injury, as the plaintiff has done in this case, to be the result of the negligence of the corporation itself, and this consideration might dispose of the demurrer adversely to the defendant. But the argument for the defendant, as we understand it, goes further, and asserts that the defendant, being a corporation, and inca

pable of acting except through the agency of servants, the complaint shows upon its face sufficiently that the negligence was that of a fellow servant, for which the plaintiff has no remedy; in accordance with what is stated to be the settled rule of law in this country and in England, namely, that a master is not liable to his servant for the negligence of a fellow servant while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault: Shearman & Redfield on Negligence, 101, Sec. 86.

The doctrine of law which holds a master responsible for the acts of his servants is embodied in the maxims *qui facit per alium, facit per se*, and *respondeat superior*, the former being generally applied in matters of contract, the latter in matters of tort. The maxim *respondeat superior* proceeds upon the principle that the wrongful act of the servant, done in the course of his employment, is, in contemplation of law, the act of the master himself. And the principle is founded upon public policy and convenience. The master chooses his servant, and directs and controls him in his work. It is the master who is doing the work, through the instrumentality of a servant. There is obvious justice in holding him responsible for injuries done by his servants while so engaged, otherwise the master might carry on the most hazardous enterprises through the medium of careless and practically irresponsible servants, without liability for injuries caused by such servants to third persons, and so these latter be left virtually without redress. The master—the real cause of the injury in such cases—would so be allowed to take advantage of his own wrong, in violation of another established legal principle. The maxim, then, which permits the injured party to obtain redress from the real author of the wrongful act, is founded in wisdom. This is the plain and undoubted rule of law when the injury is received by a stranger. When, however, the injury is done by one fellow servant to another, an exception to the general operation of the maxim has been made. It is upon this exception that the defendant relies to defeat plaintiff's action.

This exception is firmly established in England, and in the United States the general, though not universal, current of authority is with the English courts. Whether the rule as quoted

above, embracing this exception, is law to the extent claimed, is a question new in this court, and one which has never been directly passed upon by the Supreme Court of the United States. But the language of the latter court, in two recent cases, shows plainly that the rule is considered open for argument, consideration and possible qualification: *Packet Co. v. McCue*, 17 Wall. 508; *Railroad Co. v. Fort*, 17 Id. 553. In the case of *Fort*, the court, speaking on the general proposition embraced in the rule, said: Whether it be true or not we do not propose to consider, because, if true, it has no application to this case. Yet the case was one in which a youth of sixteen, being employed in a machine shop of the company, lost his arm while obeying a direction of Collet, under whose superintendence he was, to ascend a ladder and adjust a belt. Indeed, this case can not be reconciled with the more extreme English and American cases, and must be considered as in some degree a modification of the rule relied upon by the defendant, which exempts the master, though the servants are employed in different branches of the common business or are of different grades, the servant injured being under the authority of the one causing the injury. The highest courts of Ohio, Kentucky and Wisconsin have either rejected this rule entirely, or modified it so as to exclude from its operation cases where the servants are in different departments of the common business, or the servant causing the injury is in authority over the injured servant: *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Denning*, 17 Ohio St. 197; *Railroad Co. v. Collins*, 2 Duvall, 114; *Chamberlain v. Railroad Co.*, 11 Wis. 238. In *Dixon v. Rankens*, the Court of Session of Scotland wholly denied the rule, as entirely unrecconcilable with legal reason: 1 Am. Railway Cases, 569. In Pennsylvania, two of the five judges, and in South Carolina three of the ten judges dissent from the leading decision affirming this rule: *Ryan v. Railroad Co.*, 11 Harris, 384; *Murray v. Railroad Co.*, 1 McMullan, 387.

In a case decided in 1867, the Supreme Court of Connecticut, while accepting the rule upon the authority of former adjudications, use this language in reference to the policy upon which it is said to be founded: "With respect to considerations of policy, it is by no means certain that the public inter-

est would not be subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer by it. A principal is responsible to an employe for his own negligence; why should he not be liable for that of his agent, over whom the employe has no control, and of whom he may have no knowledge." *Burke v. Railroad Co.*, 34 Conn. 474. See also, *Waller v. Railway Co.*, 2 H. & C. 111, in note.

In the present state of judicial decision, inquiry may, without presumption, be made whether and how far the rule is, or is not true; especially, when we remember that it is of recent origin—is, in fact, an exception ingrafted upon an ancient maxim of the common law, from considerations of public policy and convenience, as the rule best calculated to protect the rights, and secure the safety of all between whom the social relation of master and servant exists.

On looking into the decisions which support the rule, we find they proceed upon the theory that there is an implied condition in every contract of service that the employe takes upon himself all the ordinary risks of the service, including the negligence of his fellow servants, and that in consideration of assuming such risks the servant receives increased compensation.

The justice and policy of this are maintained by these arguments: That these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master; that they are perils which can be as distinctly foreseen and provided for in the rate of compensation as any others; that where several persons are employed in one common enterprise, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require; that if we are to teach each agent that for the negligence of others resulting in an injury to himself he can grasp the treasures of his principal, he ceases his

vigilance over those with whom he works ; a bribe is held out to him to incur personal risks which he may have facilities to render partially harmless to him, but which may carry destruction to others; and, finally, that the safety of all will be better secured by enforcing the rule, than by giving the servant his action against his master: *Farwell v. Railroad Corp.* 4 Met. 49; dissenting opinion of Spaulding, judge, in *Stevens v. Railroad Co.*, 20 Ohio, 150. This reasoning will not support the rule, unless the general terms "fellow servants" and "common employment" are taken in a restricted sense. The rule requires us to imply certain terms not expressed by the parties to be part of the contract of service, and the question is, how far considerations of public policy and convenience authorize courts to go in that direction.

That every servant takes upon himself the ordinary risks and perils of the service he undertakes, must be admitted as a rule founded in justice and sound policy. That these ordinary risks include all such as are liable to happen in the performance of the work he engages to do, although he and his fellow servants discharge their duty and exercise due care, is also clear.

Nor will it be denied that if the servant has contracted to serve in any specified branch or department of his master's general business, he assumes the risks arising from the negligence of those of his fellow servants, not his superiors in authority, who are engaged in the same department, whose conduct he has an opportunity of observing, and, against the consequences of whose negligence he can thus, to some extent, protect himself by the exercise of his own care and prudence. But it seems apparent that any rule which goes further, and throws upon the servant any risks other than those which are the natural and ordinary incidents of the work he agrees to do, and which he might fairly anticipate as liable to accompany his undertaking, is unjust and indefensible. Such a rule, we think, is the one in question, when so construed as to include in the term "fellow servants engaged in a common employment" all who are employed by the same master, though laboring in distinct and separate departments of his business. Carried to this extent, the rule relieves the master of a responsibility which justice and policy alike require he

should bear. Among the duties and obligations arising out of the relation of master and servant, the law regards that of the master to provide for the safety of the men in his employment as the first and highest. It is peculiarly so where, like that of mining, the business is hazardous. This obligation includes the exercise of due care in the selection of all who are to act for him, and requires him at least to see to it that those who labor in one department of his business are not injured by his chosen servants in another. Unless this is so, there is no adequate protection to the laborer against his employer's negligence; for the workmen in one department, having no authority over those in another, nor any opportunity of observing or influencing their conduct, or of guarding themselves by their own care and prudence, are defenseless save through the watchful care of the master, which can be secured only by throwing upon him the responsibility of seeing that each department of his business is conducted with due care. It is assuming the whole question—as to the reason, justice and policy of exempting the master from liability in such cases—to say that such exemption is implied from the contract of service; for unless the exemption is demanded by reason and sound policy, it ought not to be implied.

The defendant is a corporation engaged in mining. From the trustees down to the lowest grade of its employees, all are engaged in one common object: namely, obtaining gold and silver from the mine. In a general sense, they are all fellow servants engaged in a common service. Yet no court, it is believed, has gone so far as to say that all these are fellow servants within the rule contended for here by the defendant. If the defendant negligently provides insufficient machinery, the negligence is necessarily that of some one of its servants; yet all the courts agree that it may be liable to, one of its servants for such negligence. So if there is neglect in selecting a servant, it must be the neglect of some servant of the corporation; yet there is no doubt that the corporation is liable, if, from such neglect, injury results to a fellow servant. In these cases, the servant injured, and the one guilty of negligence, are not regarded as fellow servants within the rule. Hence it can not be truly said that the servant, by his

contract of service, impliedly takes upon himself the risk of injury from the negligence of all who, in a general sense, are his fellow servants. As between some who, in common speech, are properly enough called fellow servants, the master's liability attaches; as between others, it does not. Who are to be considered fellow servants, engaged in a common business, within the rule, is in some degree an open question in each case, to be determined by the facts of the particular case. But there should be some established principle to guide us in determining that question, and it ought to rest on sound reasoning. The principle which lies at the foundation of the master's exemption in any case, is this: That the servant, having voluntarily entered into a contract of service to do a specified work for a specified compensation, has thereby accepted the ordinary perils incident to doing that work; and whenever the negligence of another employe of the same master can be considered an ordinary risk, one which he might reasonably anticipate at the time of making his contract, he accepts also the perils liable to happen through such negligence. And it seems clear that upon this principle, those only are fellow servants for whose negligence, one to another, the master is exempt, who serve in such capacity and in such relation to the master and each other that the means of the servants to protect themselves are equal to, or greater, than those of the master to afford them protection; and that further than this justice and policy forbid us to carry the implied portion of the contract of service. Beyond this an injured servant has as clear title to relief against the master as a stranger, upon the maxim *respondeat superior*. Such cases as that of Fort, in 17 Wallace, and *Ford v. Railroad Co.*, 110 Mass. 240, with many others, show that the contract of service is not presumed to regulate all the rights and duties of the parties. Under various circumstances, the master has been held liable to one servant for the negligence of another, notwithstanding the privity of contract. In such cases the master's liability attaches, not by virtue of his contract, but upon the maxim *respondeat superior*, which maxim our Supreme Court has said is of "universal application," and "wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master." *Railroad Co. v. Derby*, 14 How. 468.

Regarding the case at bar in the light of the conclusions thus reached, the complaint states a good cause of action, and it is not enough to defeat it that the negligence charged must have been that of some servant of the defendant employed in the same general business with the plaintiff. To defeat the action it must appear that the plaintiff and the person whose negligence caused the injury were fellow servants within the principles announced in this opinion.

The demurrer is overruled.

¹KIELLEY v. BELCHER SILVER MINING CO.

(3 Sawyer, 500. Circuit Court, District of Nevada, 1875.)

Negligence of fellow servant. If an employe in a mine is injured by the negligence of his co-laborer in the same line of employment, there is no liability for the injury on the part of the employer.

²**Who are fellow servants in a mine.** Parties who are engaged in the common employment of removing ore from a mine, whether occupied in blasting, picking, loading or wheeling out the ore, are fellows servants within the rule exempting their employer from liability for injuries resulting from the negligence of servants employed in the same line of employment.

³**Known risks assumed by employes.** If an employe, engaged in working a mine where the means provided for warning the workmen of an impending blast are insufficient, continues in such employment with full knowledge of the danger and of the imperfect means of guarding against it, he assumes the risk, and can not recover from his employer for injuries resulting from the blast.

Directing verdict for defendant. If the evidence in any case, when taken in the strongest light for the plaintiff, would yet be insufficient to support a verdict in his favor, the court should direct a verdict for the defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

Action against the owner of a mine for injuries sustained in the mine through the negligence of a fellow workman in

¹S. C. on demurrer, 10 M. R. 3.

²*Wood v. New Bedford Coal Co.*, 121 Mass. 252, and cases cited in 2 Thomp. on Neg. 1034.

³*Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276.

setting off a blast without giving sufficient notice to the plaintiff. At the close of the plaintiff's testimony, the defendant's counsel moved the court to advise the jury to find a verdict for defendant, upon the ground that the evidence taken as true, and most strongly in favor of the plaintiff, would not justify a verdict in his favor. The court, after argument, so advised the jury.

The other facts sufficiently appear in the opinion of the court.

LEWIS & DEAL, for plaintiff.

WHITMAN & WOOD, for defendant.

By the Court, SAWYER, Circuit Judge.

We have considered, as carefully as the time and circumstances will admit, the motion made by the defense at the close of plaintiff's testimony, to advise the jury to find a verdict for defendant. There are two points necessary to decide on this application. It is first claimed that the accident resulted from the negligence of a co-servant, engaged in the same common employment, and being the result of the negligence of this co-servant, that the defendant is not liable for his acts. Conceding, then, this accident to have resulted from the negligence of a co-servant in the same line of employment, what is the rule of law applicable to the case? There is no doubt that the general, and in fact the entire line of decisions, with scarcely an exception, is to the effect that in such case there is no liability. There is a case, it is true, in Scotland, where the doctrine is repudiated; that case is valuable simply so far as it affords an argument against the rule. The case itself was reversed by the House of Lords, on appeal. There is a case in Kentucky where the court limits the rule, and throws out some remarks of disapprobation; but the whole line of decisions and authorities upon the point where the question has arisen and been directly decided is, that where the negligent party is a co-servant, in a common employment, within the meaning of the rule, there is no liability. The Supreme Court of the United States has not passed upon the question, it is true, so far as we are aware, but the highest courts of almost every State in the Union have passed upon it.

It has been passed upon many times in England, and the authorities, as we have stated, generally deny the liability. If there be an exception, it is but an exception to the great array of judicial decisions. The only question remaining in this case is: Was Kielley a co-servant, engaged in a common employment with the parties that were letting off the blast, within the meaning of the rule? Upon that point we have no doubt whatever—no doubt that he is a co-servant within the meaning of the rule. If he is not, it would be very difficult to determine who would be a co-servant within the rule. He was engaged in the business of mining—of taking out ore from the mine. The other parties, Webber and Glenn, were breaking down the ore, either with a pick or by blasting—at this particular time by blasting—and that same ore that they were taking out was loaded in barrows and wheeled away by the plaintiff and others. They were all engaged in that common employment of removing ore from the mine. Blasting it out or breaking it down with a pick is but one stage in the process of removal; putting it in condition to be loaded in the barrow to be wheeled out is another. Those engaged in breaking down, and those in loading and wheeling, were engaged in different parts of one common employment. They were engaged in a work tending to a common object, one common end, and in connection with each other, each having a relation to the object and to the common end; one breaking down and loosening the ore, and the other removing it from the mine. If this accident was the result merely of the negligence of Weber and Glenn, they being co-servants engaged in a common employment, then under the rule as stated, and as established by the authorities, the defendant is not liable; and we do not think the Supreme Court, when it comes to consider this question, can come to any other conclusion, unless they overrule the general current of authorities, we might say the unbroken current of authorities, on that precise point. It is claimed, however, by the plaintiff, that there is something broader than this. It is claimed that the accident is not merely the result of the negligence of Webber and Glenn in letting off the blast without giving proper notice, but that it is the result of the negligence of the company, in failing to establish general rules or regulations providing some fur-

ther means than were customary in that mine of giving notice of a blast. It may be a question here—and we are inclined to think it is, but we do not propose to put the decision upon that ground—it may be a question, whether the whole is not involved in the negligence of Webber and Glenn. If it was their duty to give notice, it was their duty to give sufficient notice, independent of any general or particular regulations, and a neglect to do so would be their neglect.

But still, we shall assume—and there is some plausibility in the point—that there is something in it broader than the negligence of Webber and Glenn; that it was the duty of the company to make other regulations, additional and further regulations, for affording means of notice other than those that were ordinarily adopted in this mine. Then we come to this position: The plaintiff, upon his own testimony—for we must take his own testimony as he gives it—and taking it in the light most favorable to himself, upon his own showing, knew the mode in which this ore was loosened; that it was by blasting. He had at times been engaged in blasting, himself; he was wheeling ore out after the blasts. In this particular case he knew that the ore, if there was any there on the twelfth floor, was the result of a blast. He said he supposed that the blast had already gone off, from the fact of there being ore there; but he knew that the mode of preparing the ore for its reception in the wheelbarrow was by blasting. He knew, because he tells us so, what the customary mode of notifying parties of an impending blast was, and that was by calling out “fire.” This he understood to be the customary mode. He knew, according to his own statement, that no other precautions were taken; he knew that no lights were placed at the point of the contemplated blast, and he knew that no bells were placed in the cooling-room, because that was a matter of conversation between him and his co-laborers. He knew the number of men that were provided to notify those approaching, as it was also a matter of conversation between them that the means of notification were insufficient, and it was suggested, among other things, that bells might be arranged in the cooling-room, to give notice of the coming blast. Now, having knowledge of all those matters, he still does not seem to have complained to the defendant, but having that knowledge, and

knowing the only means that were ordinarily taken to give notice of a blast, and knowing that those were insufficient to obviate all danger, he still continued in that employment. He had no reason to expect that any other notice would be given. He knew that no other was usually given, and that it was insufficient, and, under the authorities, we think that he went on with the business and assumed the risks which he knew attended it. It is not a matter of ignorance with him. In fact, he knew the means afforded for giving notice of danger, and beyond these, he assumed himself the responsibility of guarding himself against the dangers resulting from the blasting. We think it is entirely and clearly within the case of *McGlynn v. Brodie*, 31 Cal. 376, and the cases there cited. This is not a matter of general reputation for neglect on the part of defendant, as claimed by counsel for the plaintiff—general reputation for carelessness; it was a knowledge of the actual mode of doing this particular business in this particular mine. He knew where they were blasting, according to his own testimony. He knew the mode of their taking the ore out; He knew in what the danger consisted; he knew that there was a blast liable to be set off at any time. He had been engaged in this work for a long time; engaged in that employment some months; and it was with reference to this subject of blasting that the discussion took place in regard to placing signal-bells in the cooling-room, to which they resorted in their daily work, and having reference to the blasting that was done as a means of loosening the ore which he himself was wheeling out. It was, therefore, a special knowledge in regard to this particular matter, and not a general reputation—not a general report, but knowledge of the precise circumstances under which he was working, and of the danger to which he was subject. It was with that knowledge, and with the full knowledge of the only means that were taken to advise him of impending danger, and that he had no reason to expect any other warning, he went on with the work, and we think, under the law, he assumed the risk—assumed to take such precautions himself to ascertain when a blast was going off as were necessary, beyond those which were customary in that mine, and which he knew to be customary. We think, therefore, it is within the case referred to, and the authorities

do not seem to be conflicting upon that point; they seem to be all one way. So far as they have been called to our attention, none seem to conflict with the case of *McGlynn v. Broolie*, and the cases there cited.

Then, taking the facts as stated by plaintiff himself, taking them in the strongest light in his own favor, we do not think he has made out a case that would justify us in giving it to the jury. We think, upon these points, that if the jury should find against the defendant in this case, the court would be compelled to set aside the verdict for want of evidence to support it. The motion, therefore, must be granted.

This is a hard case—undoubtedly a very hard case; but still the rules of law are rigid, and we are bound by them. we very much dislike to take any case from the jury, where there is anything that is proper to submit; but it would be, in our judgment, only consuming further time to no purpose if we were to go on with this case. We think, under the rules of law as established, and which we can not abrogate, which we are not authorized to overthrow, that this case must be taken from the jury and the motion granted.

The jury, by direction of the court, found a verdict in favor of the defendant.

THE BEREA STONE CO. V. KRAFT.

(31 Ohio State, 287; 27 American R. 510. Supreme Court, 1877.)

¹ Foreman, superior servant. A foreman in charge of hands, is not a fellow, but a superior servant.

When a foreman is for the moment discharging the duties of a laborer, his master is answerable for negligence arising from his acts to the same extent as if the act causing the injury had been done by an inferior servant under his directions.

Variance as to kind of negligence charged. Where the complaint avers neglect by failure to furnish suitable machinery, instructions based on negligence by the improper use or handling of machinery in itself safe, are not pertinent.

Choice of instrumentalities. Where safe and unsafe instrumentalities are at hand with which to perform a particular work, the adoption of the latter to the exclusion of the former is negligence.

¹ *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. R. 35.

Motion for leave to file a petition in error to reverse the judgment of the District Court of Cuyahoga County.

The defendant in error brought an action against the plaintiff in error to recover damages for an injury to his person. He alleged the company to be a corporation organized to quarry and manufacture stone, and that while in its employment and engaged in loading stone upon its cars, without fault on his part he received the injury complained of through the carelessness and negligence of the agents and servants of the company, in this, to wit, that they so carelessly and negligently conducted its business "in the selection, use and employment of unsafe, insecure and dangerous implements and machinery for the purpose of loading the said stone upon cars for transportation, * * * as to drop a large stone, of about three thousand pounds weight, upon the plaintiff's foot, whereby he became permanently injured." The answer denied the negligence charged, and alleged that the injury was "wholly occasioned by the negligence of the plaintiff." The case went to a trial to a jury, and resulted in a verdict for the plaintiff below. A motion for a new trial, assigning, among other grounds, that the verdict was not sustained by sufficient evidence, was overruled, and judgment entered on the verdict, the defendant excepting. A bill of exceptions, containing all the evidence, was signed and sealed by the judge presiding, from which it appears that evidence was given tending to show that on the day the injury occurred the company was engaged in loading stone from the quarry on cars, under the direction and superintendence of one Orville Stone, its agent, who was foreman of the quarry; that the company employed for such purpose certain machinery and implements known as a derrick, wire rope, chain and hooks. The chains were designed for use in hoisting soft stone, and the hooks for raising hard stone, and the latter were unsafe and dangerous when used to hoist or raise soft stone, of which fact Stone and the company had knowledge. The plaintiff below and another laborer were engaged in loading the stone, the plaintiff being at the car, situate some twenty-five to thirty feet above the stone to be loaded. While such co-laborer was temporarily absent from his post of duty, Stone, the foreman, under whose

directions the hooks were being used instead of the chains, fastened the same, with the assistance of a workman of the quarry, to a soft stone, to be elevated and placed on the car by means of the derrick. As the stone reached and was swung over the car, Kraft took hold of it to steady it to its place, when the hooks gave way where fastened to the stone, breaking out a part of the same. The stone instantly fell, inflicting the injury. Upon the close of the evidence the defendant below asked the court to instruct the jury as follows: 1. "That a corporation is liable to an employe for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance." 2. "That if the injury happened" (was caused) "by the negligence of the defendant's foreman, when he was doing the work of a co-laborer with the plaintiff, and not when in the discharge of his duties as foreman and representative of the defendant, the plaintiff can not recover, unless the plaintiff shows that the defendant did not exercise reasonable care and prudence in the selection of a foreman."

The court refused to give either of these requests, and the defendant excepted. On error, the district court affirmed the judgment of the court of common pleas. The plaintiff asks leave to file a petition in error to reverse both judgments.

E. SOWERS, with whom was J. E. INGERSOLL, for the motion, claimed that Kraft was injured through the carelessness and negligence of a co-laborer, and therefore he can not recover: *Flike v. Railroad*, 53 N. Y. 549; *Harper v. Railroad*, 47 Mo. 567; *Brickner v. Railroad*, 2 Lans. 506; *Ford v. Railroad*, 110 Mass. 240; *Corcoran v. Holbrook*, 59 N. Y. 517.

A. SLUTZ, with whom was W. T. BUCKNER, *contra*, cited *Railroad v. Devinney*, 17 Ohio St. 210; *Flike v. Railroad*, 53 N. Y. 549, 554.

BOYNTON, J.

The errors assigned for which a reversal of the judgment is sought, are the refusal of the court to give to the jury the

instructions requested, and the order overruling the motion for a new trial. That a corporation is liable to an employe for negligence, or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank of the agent intrusted with their performance, may, as matter of law, be very clear, but the proposition has no application to the case. It is true that the negligence charged as the cause of the injury, consisted in the selection, use and employment of unsafe, insecure and dangerous implements and machinery for the purpose of loading stone upon cars for transportation, but upon the trial, no question was made, or doubt raised, of the fact that the company had supplied suitable and proper machinery and implements for loading stone, both hard and soft; but its liability was asserted on the ground of its negligent and careless use or employment of machinery and apparatus for hoisting stone, safe and suitable for the especial purpose or use for which such machinery was designed, but unsafe and dangerous for the use to which it was applied. The request obviously had reference to the duty of a master to furnish, so far as the exercise of due care will accomplish it, suitable and safe instrumentalities for carrying forward his work, and these having admittedly been furnished, and the request having no other bearing, it was properly refused.

The second request was evidently founded on a misconception of the negligent act which gave rise to the company's liability. It was founded on the hypothesis that the want of care charged, and resulting in the injury to the defendant in error, consisted in the negligent or careless attachment of the hooks to the stone to be raised; hence it was contended that when Stone, the foreman, assisted in attaching or fastening the hooks to the stone, he was performing, not the duty of foreman, but the work of a common laborer, for the negligent performance of which the company was not liable.

This was clearly a misapprehension of the ground upon which the liability of the company was asserted. The petition, as above stated, alleged negligence in the selection, use and employment of unsafe, insecure and dangerous implements and machinery. This was the full scope of the averment. No act of negligence was charged, and no liability claimed to

exist, except such as originated in and grew out of the selection, use and employment of such implements and machinery for loading stone. The mode or manner of attaching or fastening the hooks to the stone was not the subject of complaint, nor set up as a ground for recovery of the damages claimed.

But if this construction is too limited, if the liberality with which pleadings under the code are to be construed would require us to hold that the language of the petition, charging negligence in "the use of unsafe and dangerous implements," is sufficiently broad and comprehensive to include the act and mode of attaching the hooks to the stone, and is not to be confined and restricted to the sense that the hooks, being unsuitable for such service, were misapplied to an improper use, we still think the court did not err, as the proposition embraced in the request is not correct as a rule of law. Where the master, or one placed by him in charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and control, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability: *Ormond v. Holland*, El. Bl. & El., 102; *Shear. & Red. on Neg.*, § 89, *et seq.*; *Wharton on Neg.*, § 205.

The ground of the liability of the master for the negligent conduct of his servant in all cases where the liability arises is, that the servant's act is the act of the master. The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow servant, has no application where the servant, by whose negligent conduct or act the injury is inflicted, sustains the relation of superior in authority to the one receiving the injury. The claim that Stone was a fellow servant, engaged in the same service with Kraft, is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter the relation, substantially, of principal,

he was in no just or proper sense a fellow servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisprudence of the State, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury: *Little Miami R. R. v. Stevens*, 20 Ohio, 415; *C. & C. R. R. v. Keary*, 3 Ohio St. 201; *Mad River R. R. v. Barber*, 5 Ohio St. 541; *Whalan v. Mad River R. R.*, 8 Ohio St. 249; *The Pittsburgh, F. W. & C. Railway v. Devinney*, 17 Ohio St. 197.

The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised, may have caused the injury, and that he was then performing the duties of a common workman, and not those strictly pertaining to the duties of foreman, in no wise relieves the company from liability. If the act done by him had been done under his direction, as he did it by one of the employes of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master; and it could be no less the act of the master when performed by the foreman in person.

In support of the claim that a new trial ought to have been granted on the ground that the evidence was insufficient to sustain it, it is contended: 1, that the evidence fails to show that the injury was occasioned by negligence; 2, that there is a fatal variance between the allegations and proof; and 3, contributory negligence by the plaintiff. We have carefully examined the evidence, and think neither of these objections can be sustained. We have the most doubt on the subject of contributory negligence. But on the whole, our minds are not so clearly satisfied that the finding of the jury was wrong as to lead us to disturb the judgment. On the subject of the company's negligence, there is no doubt that the verdict was right. Where safe and unsafe instrumentalities

are at hand, with which to perform a particular work, the adoption of the latter to the exclusion of the former, is clearly negligence. This is what the company did in the present case, and in so doing occasioned the injury to the plaintiff below.

Motion overruled.

MCLEAN V. THE BLUE POINT GRAVEL MINING CO.

(51 California, 255. Supreme Court, 1876.)

Negligence of fellow servant—Liability of employer. By the Civil Code of California an employer is not bound to indemnify his employe for losses in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe.

Injury of inferior by superior. The code referred to recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged

Appeal from the District Court, Tenth Judicial District County of Yuba.

The defendant was engaged in mining for gold at Sucker Flat, county of Yuba. The plaintiff was in its employ, and was engaged in picking dirt and gravel into the defendant's ground-sluice. The defendant was engaged in blasting rock on the mine. One Kegan was the foreman of all the work, and had authority to employ and discharge hands. The plaintiff was struck by a rock thrown from a blast a distance of about three hundred feet. He was exposed to injury by the blast, and it was by means of Kegan's negligence that he was not notified that the blast was to be fired. The defendant recovered judgment, and the plaintiff appealed

P. VANCELIEF, for the appellant.

WM. IRVINE, for the respondent.

MCLEAN V. BLUE POINT GRAVEL MINING CO. 23

BY THE COURT.

Section 1970 of the Civil Code (which "establishes the law of this State respecting the subjects to which it relates,"—Id. Sec. 4) provides as follows:

"SEC. 1970. An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risk of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe."

The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow servant with the plaintiff—"another person employed by the same employer in the same general business," that is, the business of working the mine of the defendant—Kegan being in the blasting, and the plaintiff in the hydraulic department of the "general business." The section of the Civil Code already recited declares that to such a case the rule of *respondeat superior* shall not apply, unless there has been want of ordinary care upon the part of the defendant *in the selection of the culpable employe*. But the fact was, as found by the court below, that there had been no such want of ordinary care on the part of the defendant; Kegan, the "foreman," being found to be "skillful, competent," and a proper person to perform the duties with which he was charged. "The law of this State respecting this subject," as set forth in the code referred to, recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were, in common, engaged, and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands: *Collier v. Steinhart*, 51 Cal. 116.

Order affirmed.

HIGHAM, Appellant, v. WRIGHT ET AL., Respondents.

(Law Reports, 2 C. P. Div. 397. Common Pleas Division of the High Court of Justice, 1877.)

¹ **Miner held to regulations after discharge while still in the pit.** By the Coal Mines Regulation Act, 1872, § 52, power is given to frame special rules for the conduct of persons employed in or about a coal mine. By a special rule in force at the Hewlett pit, no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In this mine the workmen had power to discharge themselves at a moment's notice. The respondents, workmen there, being dissatisfied, discharged themselves and asked the hooker-on to allow them to ascend the pit, but he refused to give such permission until the ordinary time came for workmen to quit the mine. The respondents, however, ascended contrary to his direction. *Held*, that the respondents were guilty of a breach of the special rule above mentioned and liable to the penalty imposed for breach thereof.

Case stated by justices of the peace for Lancashire under 20 and 21 Vict. Ch. 48.

An information was preferred by the appellant against the respondents under Sec. 52 of 35 and 36 Vict. Ch. 76, charging that the respondents being employed in a coal mine, known by the name of No. 2, Hewlett Pit, the same being a coal mine within the intent and meaning of 35 and 36 Vict. Ch. 76, and being then worked, unlawfully did violate one of the special rules duly established for and then in force in that mine by then and there going up the pit contrary to the direction of the hooker-on.

At the hearing of the information the following facts were proved: The appellant was the hooker-on employed at the bottom of No. 2 Hewlett Pit, in Westhoughton, belonging to the Wigan Coal and Iron Company, and the respondents, at six o'clock in the morning of the 27th of February, 1877, were the servants of and employed by that company as coal miners

¹The details of these acts extend to *minutiæ* unknown in the United States; many of them are beneficent and intended for the protection of the workmen, but when construed as in this decision, are mere instruments of revenge and oppression. The opinion refers apologetically to the fact that the miners had no counsel.

and did then descend the pit to go to their work. In accordance with Sec. 52 of the Coal Mines Regulation Act, 1872, there were established in this mine special rules for the conduct and guidance of the persons acting in the management of such mine, or employed in or about the same. By rule 25, "the word 'he' * * * shall mean a person employed in or about the works;" and by rule 42, "He shall not go down or up into the pit contrary to the direction of the banksman or the hooker-on;" and it was for the violation of this rule that the respondents were brought before the justices.

At the bottom of the pit the following notice was hung up, and was there upon the day in question, and had been put up there by a person named W. James, who was the underlooker at the pit; but it bore no signature, and did not appear to be issued by any authority, except that it bore the words, "by order."

"NOTICE.

"No work person allowed to ascend the pit before two o'clock in the afternoon, of the morning turn, and the afternoon turn not before ten o'clock, unless by accident or by permission from the underlooker or fireman.

"Neither must any work person signal himself to ascend the pit without orders either by the underlooker or fireman.

"By order.

"January 17, 1877."

This at most was a mere regulation by the company or one of their servants and not one of the special rules. At this pit the working hours for persons employed on what was called the first shift were from 6 A. M. to 2 P. M. The masters could terminate the contract with the workman at any time of the day at a moment's notice, either down the pit or above ground, and the workman could in like manner at any time terminate his contract with the employers.

At eight o'clock in the morning of the day in question, the respondents being dissatisfied with their working place, they alleging that it was a very wet place and that they required to be paid for drawing water therefrom, went to the underlooker and the appellant and said that they did not intend to work there any longer, and that they would leave their employ-

ment; and the respondents asked the underlooker and the appellant at 9 A. M. to be then allowed to ascend the pit. The underlooker refused to allow them to ascend, and gave directions to the appellant not to allow them to ascend until 2 P. M. The respondents several times requested the appellant to be allowed to go up, but the appellant persistently refused. At 1 P. M. the respondents told the appellant they would go up; they got into the cage and gave the proper signals to the banksman at the top of the pit to wind them up. The cage ascended part of the way, and then the appellant signalled up the pit and the respondents were let down again. Some altercation then took place between the respondents and the appellant, and the appellant was slightly assaulted by one of the respondents, and the respondents again got into the cage, gave the signals, and were drawn to the top.

It was contended, on the part of the appellant, that upon these facts the respondents had brought themselves within the meaning of No. 42 of the special rules, and that they ought to be convicted. It was admitted on the part of the appellant that if the respondents had been discharged from their employment by the underlooker at 9 A. M., he, the underlooker, would have allowed the respondents to go up the pit at that time.

It was contended on the part of the respondents that inasmuch as they had a perfect right to put an end to their contract at any moment either above ground or below, and they had actually discharged themselves from the service of their employers at eight o'clock on the morning of the day in question, being no longer servants of the company they were no longer bound by the rules in force in the mine, and that such rules applied to workmen only whilst so employed in the mine; and that being so discharged they ought to have been allowed to ascend the pit when they asked the underlooker and hooker-on at 9 A. M., and that the appellant was guilty of imprisoning the respondents in the pit against their will for four hours, namely, from 9 A. M. to 1 P. M., and during such time they did no work and were not in the employment of the company.

A majority of the justices were of the opinion that the respondents, having stated at 8 A. M. their intention of no longer

working in the pit and of leaving the service of their employers at once, and having so determined their contract, ought to have been allowed to go up the pit at 9 A. M. when they asked permission so to do; and the majority of the justices were also of the opinion that the respondents, from the time of their putting an end to their contract, ceased to be persons employed in the mine, and after having been refused permission to ascend the mine, were no longer subject to the special rules then in force at the mine.

The information was therefore dismissed.

The question of law therefore was whether the majority of the justices were right in refusing to convict.

F. HERSHELL, Q. C., (FITZ ADAM with him) for the appellant.

The respondents did not appear.

GROVE, J.

I should have been better satisfied if this case had been argued on behalf of the respondents, but I have come to the conclusion that the contention of the appellant's counsel is right, and that it puts the only reasonable and proper construction upon the special rules framed in accordance with Sec. 52 of the Coal Mines Regulation Act, 1872. Now this section provides as follows: (The learned judge read it.) The meaning of the enactment is plain; it authorizes the framing of rules for the safety and proper discipline of persons employed in a mine, and further, it allows regard to be had to "the particular state and circumstances of such mine." I think that by a rule properly framed under this section, a person not employed in a mine might be restrained from going out of it at a specified time, if a rule of this kind were fairly necessary for the discipline or safety of those employed in it; and in that event the difficulty arising in the present case would not occur. But the information was laid under No. 42 of the special rules applying to No. 2 Hewlett pit, by which it is provided that "he shall not go down or up or into the pit, contrary to the direction of the banksman or the hooker-on." And upon turning to No.

25, "he" is explained to mean "a person employed in or about the works." The respondents had the power of dismissing themselves and of giving up their employment at a moment's notice, and the argument which appears to have prevailed before the justices is, that from the moment the respondents gave notice that they had quitted the employment they ceased to be "employed in or about the works," and therefore they did not fall within the meaning of the word "he," as used in No. 42 of the special rules, and were not prohibited from ascending the pit without the consent of the hooker-on. Upon a very close scrutiny of the rules this may appear to be their literal interpretation; but Sec. 52 declares that special rules shall have the same force as if they were enacted in the act, and it is a principle to be observed as to the interpretation of statutes, that where a strictly literal construction leads to a manifest absurdity, a construction may be adopted which will carry out what may be reasonably supposed to have been the intention of the legislature.

Now, I think that a strict construction of No. 42 of the special rules would defeat the objects of the legislature, as stated in Sec. 52, and might endanger the safety of persons employed in the mine, and might produce great difficulty in the proper working of it. If the contention for the respondents before the justices were correct, any person who had accepted employment with the power of giving it up at a moment's notice, might quit the mine at any time, and by so doing might utterly derange its management, and might occasion great danger to the lives and limbs of the workmen employed therein. I think that when persons have gone down a pit for the purpose of being employed therein, and have been so employed, they must by reasonable implication be taken to have accepted that employment subject to such regulations as are made for the benefit of the mine; therefore, if they put an end to the relation of master and servant, they can only do so upon such conditions as are necessary for the proper working of the mine; for instance, suppose it were expedient for the due ventilation of a mine that certain doors should be kept shut during specified hours, workmen who discharged themselves could not, in order to leave the mine, open these doors during the time when they ought to be shut. I think that the construction

put by the majority of the justices upon the special rules leads to a manifest absurdity and can not be upheld. Our judgment must be for the appellant.

LINDLEY, J.—I am of the same opinion. It appears to me that the construction put by the majority of the justices upon the expression “a person employed in or about the works” is too narrow ; the scope and object of the statute and of the special rules require a wider interpretation. Upon the morning of the day in question, the respondents went down into the mine as persons employed therein, and remained down for some time, that is, until they discharged themselves. When did their character of persons employed in the mine cease ? The majority of the justices have taken the view that at the moment when the respondents terminated their contract of service, they ceased to be “persons employed in or about the works.”

Within the meaning of No. 25 of the special rules, I think that a mistake. No doubt the contract of service was at an end when the respondents gave notice to terminate it, and I am disposed to think that if a reasonable time had elapsed for going out of the mine, regard being had to its extent, and if permission to quit it had then been refused to the respondents, they would no longer be in the position of persons employed in the mine ; but upon the facts stated in the case before us, I think that their character of persons employed in the mine continued when they quitted it contrary to the direction of the hooker-on, for a reasonable time had not then elapsed. In this point of view the notice at the bottom of the pit becomes very important, for it plainly indicates that the end of the morning shift was the proper time for the respondents to quit the pit. If they had been detained after that time, a very different question might have arisen ; but until then they were subject to the operation of the special rules.

Judgment for the appellant.

LEHIGH VALLEY COAL CO. v. JONES.

(86 Pennsylvania State, 432. Supreme Court, 1878.)

Ventilation. Method of described.

¹ **Who are fellow servants.** In order that workmen should be fellow servants within the meaning of the rule that a master is not responsible to a servant for an injury caused by his fellow servant, it is not necessary that the workman causing and the workman sustaining the injury should both be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing services for the same general purposes.

² **Idem—Overseer and workman.** The rule is the same, although the one injured may be an inferior in grade and subject to the control and direction of the superior whose act caused the injury, provided they were both co-operating to effect the same common object.

A “mining boss” and a “driver boss,” are fellow servants, and where the death of the latter is caused by the negligence of the former, the owner of the mine is not responsible.

Warning to deceased. To prove contributory negligence, it is competent to show that the deceased was warned to avoid the place where he was killed, and that he himself had conveyed this warning to others.

Error to the Court of Common Pleas of Luzerne.

Case by Gilbert Jones against the Luzerne Coal and Iron Company, to recover damages for the death of his son, which, it was alleged, was caused by the negligence of defendants. Plea, “Not guilty.”

It appeared that on the 12th of February, 1876, an explosion took place in a mine of the defendants, known as the Exeter Shaft, wherein four men were killed, among whom was the plaintiff's son. The mine had all the machinery and appliances necessary for ventilation required by the Mine Ventilation Act of 1870. The engines and fan were capable of throwing into; or rather drawing through the mine, one hundred and twenty thousand cubic feet of air per minute. The method of ventilation in general use in the Wyoming coal fields, and indeed throughout the entire anthracite region, is by sucking or drawing the air from some distant inlet into the mine, called a “down-cast,” through the mine, and thence up

¹ *Delaware Co. v. Carroll*, 10 M. R. 47.

² *Contra, Chicago R. Co. v. Ross*, 112 U. S. 377; *Brothers v. Cartter*, 52 Mo. 373; 14 Am. R. 424.

and out by what is called the "up-cast," which is near the shaft. This system requires that the currents of air shall be carried against the parts of the mine being worked—the "workings" specified in the Ventilation Act. This results in separating the worked out part of the mine from the part being operated, the direct currents being thrown against the breasts being worked, and the old or worked chambers and gangways being ventilated by the general suction of air through the whole mine. In order to conduct these currents of air, and to shut off certain of those parts of the mine which have been worked, doors are erected at intervals, and the several openings (from one gangway or chamber to another), closed, so far as the current thus artificially created is concerned. The Mining Ventilation Act expressly requires that these doors shall be double, that is, two doors at a sufficient distance. There being a suspension of work throughout the coal region, all general work in the mine had been stopped, and the men, numbering nearly three hundred, discharged until operations could be resumed. Only thirty men were retained, and they were set to work to build an air bridge, widen a gangway, and make such repairs as could not be effected whilst the mines were in full operation. All of these men were working near the foot of the shaft, and near the current of air. Complaints were made by the men to the mine boss, Reese, that it was difficult, and in fact almost impossible, to work, by reason of the immense volume of air passing them. The fan was then slowed down from about sixty to forty-two revolutions per minute. The witness examined on this point, an expert, familiar with this mine, testified that thirty-five to forty revolutions per minute were sufficient to ventilate the whole mine with all the men working. As a measure of precaution, however, Reese, the mine boss, warned the men not to go through any doors, or off the main gangways. This warning was repeated daily, and was communicated to Alex. Jones, who was then employed as a driver boss, and who repeated it, as he had been ordered to do, to several workmen, whom he happened to see on the morning of the accident.

After the explosion the body of Jones was found in a side chamber, inside of a door shutting off that gangway from the one in which the men were at work, and a few hundred feet from them. The fact that his body was burned and that none

of the other men employed were burned, would seem to indicate that his lamp had occasioned the explosion. The body was found by the side of some empty cars, which were also burned. Jones was "driver boss," whose duty it was to keep the miners supplied with empty cars.

The superintendent of the colliery testified that he had the general control of the management thereof; that Col. Mason was the "outside foreman," and Mr. Reese the "inside foreman" of the Exeter shaft; that the duties of Col. Mason were to take charge of the coal when it came from the mines and to have the supervision of the breakers, engineers, and outside men. Mr. Reese was also called the "mining boss." He had entire control of the inside operations in regard to the workingmen employed and the ventilation, subject to orders from the general superintendent. Harris was an assistant under him. Davis was the "fire boss," whose duty it was to go down into the mine every morning before the men began their work, to ascertain the condition of the mine and the quantity of gas therein. Jones, as before stated was the "driver boss."

At the trial before Stanton, J., the defendant offered to prove, by a witness on the stand, that on the Wednesday preceding the Saturday of the accident (witness then working in the shaft), the deceased told the witness not to go off the main gangways or through any door. The court sustained the objection to this offer and sealed an exception.

This was the twelfth assignment of error.

The following points were submitted by plaintiff, to which are subjoined the answers of the court:

1st. If the jury believe that A. Reese had entire charge of the mining and ventilation of this shaft, and that A. G. Mason had entire charge of the machinery and engines, and that by the orders of both Reese and Mason the revolution of the fan was slowed to an unsafe degree, and that the deceased lost his life in consequence while in the ordinary discharge of his duty, then the verdict should be for the plaintiff.

Ans. "This point we affirm."

2d. If the jury believe that the accident in question occurred to the deceased while in the ordinary discharge of his duty, through the negligence and want of due care on the

part of the defendant, who had control of the mining and ventilation of the shaft and colliery; then the verdict should be for the plaintiff.

Ans. "To this we say your verdict should be for the plaintiff if you find that there was not contributory negligence on the part of Alexander Jones."

The defendants asked the court to charge "that under all the evidence in the case, the plaintiffs can not recover," which was refused. This was the eleventh assignment.

In the general charge, the court, *inter alia*, said:

"When a company or an individual gives over to an agent all or any part of his business to perform, and leaves the exclusive control of it and all the discretion pertaining thereto, in the hands of said agent, anything that results from the negligent performance of such duties, the company is to be held answerable for. Taking, in this case, Col. Mason, Mr. Reese, Mr. Davis and the gentleman who was killed, Thomas Harris, they were the company's agents in this case, and for any act of negligence on their part in the line of duty assigned to them, the company is to be held responsible by you."

This portion of the charge was the fourth assignment.

The court further said:

"According to the testimony on the part of the plaintiff Jones was a careful, industrious and diligent young man. [According to that testimony, he was very much afraid of explosions of gas.] About two o'clock of the afternoon of that day, according to this evidence, an explosion of gas occurred in the mine, and he was killed thereby. [Now, if you find that he was simply performing his duty there, that he was then in the line of his duty, and that this explosion on account of the negligence of the defendant, then Gilbert Jones is entitled to damages for the life, or rather for whatever he has lost by the death of his son.]"

The foregoing portions of the charge in brackets constituted respectively, the fifth and sixth assignments. The verdict was for plaintiff for \$3,600. The defendants took this writ, the assignments of error, *inter alia*, being those above noted.

J. VAUGHAN DARLING, SAMUEL DICKSON and HENRY M. HOYT, for plaintiffs in error.

CHARLES E. RICE and ALEXANDER FARNHAM, for defendant in error.

Justice MERCUR delivered the opinion of the court, May 6, 1878.

This suit was brought by defendant in error to recover damages for the death of his son, Alexander Jones. He was killed by an explosion of gas, in the colliery of the plaintiff in error, known as the "Exeter Shaft," and while in the employ of the company. It is claimed that the explosion was caused by an insufficient supply of fresh air.

This mine was ventilated by the method usually practiced in the coal fields of Wyoming. It is by drawing the air through an inlet, called a "down-cast," into the mine, and having passed it through the mine, then up and out by what is called the "up-cast," which is near the shaft. The movement of the air is effected by means of a "suction fan." It creates a vacuum, and that vacuum is filled by the natural pressure of the atmosphere, thereby creating a continuous current. A current of fresh air is thus drawn in, and thrown out, and the gas passes out with it. The fan is a wheel of about twenty feet in diameter, having paddles thereon of about six feet in width. Its effectiveness depends on the rapidity of its revolution. The quantity of fresh air necessary to be passed through the mine depends on the number of men employed therein. The 7th section of the act of 3d March, 1870, *Purd. Dig.* 1069, pl. 7, declares that in every mine or colliery an adequate amount of ventilation shall be provided, "of not less than fifty-five cubic feet per second of pure air, or thirty-three hundred feet per minute for every fifty men at work in such mine, and as much more as circumstances may require." The defendant in error proved, by James Bryden, that the fan in use at the time of this accident was of sufficient capacity, when driven, to thoroughly ventilate the mine, and that from thirty-five to forty revolutions a minute would secure perfect ventilation; also that at about forty revolutions a minute, the cubic contents of the ventilation would be about sixty thousand feet per minute. At the time of the accident there were only twenty-nine or thirty men at work in the

mines. Hence the ventilation at forty revolutions per minute would be thirty times greater than the statute required. No witness testified that the fan was either defective in construction or insufficient in capacity to properly ventilate the mine. The complaint was that the revolution of the fan was so lessened, that it did not remove the noxious gases, and the explosion therefore resulted. It appears that some days prior to the explosion all general work in the mine had been stopped. Most of the three hundred persons or thereabouts who had been at work, were discharged. Some thirty only were retained. They were engaged in making some improvements and repairs in the mine, which could not well be done when it was in full operation. Alexander Jones was one of these men. They were at work near the foot of the shaft, and so near the current of air as to be annoyed thereby. They complained to Mr. Reese, the "mine boss," that this large volume of air made it difficult for them to work. At their request the fan was "slowed down." The natural effect of this would be to check the removal of the carburetted hydrogen, and therefore to permit more of it to remain in the mine.

Jones's body was found in a side chamber, inside of a door shutting off that gangway from the one in which the men were at work, and a few hundred feet from them. Whether any duty called him into that gangway does not clearly appear. The marks of burning found on his person would indicate that his lamp caused the explosion; but the jury has found that he was not guilty of any contributory negligence. The main question now presented for our consideration is whether there was any evidence of negligence for which the plaintiff in error is liable. It is claimed that the negligence, if any, was that of Jones's fellow servants, for which the company is not liable.

It is well settled in England and in Pennsylvania, and pretty generally in this country, that a servant who is injured by the negligence or misconduct of a fellow servant, can not maintain an action against the master for such injury. If, however, there be fault in the selection of the other servant, or in retaining him in his place after he has proved incompetent, or in employing unsafe machinery, the master may be liable. So, if the master has placed the entire charge of the

business in the hands of an agent, exercising no authority, and no superintendence of his own therein, he may be liable for the negligence of such an agent, to a subordinate employe. This rule of liability for the negligence of a general agent applies whether the master be an individual or a corporation. Owing to the fact that the business of corporations is transacted by means of agents, they would escape the just measure of liability unless this rule applied to them. In this respect, both as to liability and for protection, they stand on the same footing with individuals.

The question arises, who are fellow servants in contemplation of law? To constitute such they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, although the one injured may be inferior in grade, and is subject to the control and direction of the superior, whose act caused the injury, provided they are both co-operating to effect the same common object. The true reason upon which, I think, this rule rests is, that each one who enters the service of another, takes upon himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow workmen, in the general course of his employment, are within the ordinary risks. Omitting numerous cases which sustain the principle we have stated, we will content ourselves with citing *Wilson v. Merry*, Law Rep., 1 H. L. Scotch Ca. 326; *Hall v. Johnson*, 3 H. & C. 589; *Morgan v. The Vale of Neath Railway*, 35 L. J. Q. B. 23; *Howells v. Landore Steel Co.*, Law Rep. 10 Q. B. 62; *Albro v. Canal Co.*, 6 Cush. 75; *Gillshannon v. Stony Brook Railroad*, 10 Id. 228; *Gilman v. Eastern Railroad*, 10 Allen, 233; *Russell v. Hudson Railroad*, 17 N. Y. 134; *Boldt v. New York Central Railroad*, 18 Id. 432; *Wright v. Same*, 25 Id. 562; *Fort v. Railroad*, 2 Dillon, 259; *Chicago & A. Railroad v. Murphy*, 53 Ill. 336; *Wonder v. B. & O. Railroad*, 32 Md. 411; *Ryan v. Cumberland Val. Railroad*, 11 Harris, 384; *Frazier v. Penna. Railroad*, 2 Wright, 104; *Caldwell v. Brown*, 3 P. F. Smith, 453; *Weger v. Penna. Railroad*, 5 Id. 460; *Ardesco Oil Co. v. Gilson*, 13 Id. 146; *Patterson v. Pitts. & Connells. Railroad*, 26 Id. 389; *Mullan v. Phila. Steamship Co.*, 28 Id. 25.

In part of the charge covered by the fourth assignment, the learned judge said to the jury, "that Colonel Mason, Mr. Reese, Mr. Davis and Thomas Harris were the company's agents in this case, and for any act of negligence on their part in the line of duty assigned to them, the company is to be held responsible by you." The question then is, did the evidence show that these persons, or either of them, sustained such relation toward the plaintiff in error as to make it liable for their misconduct? The company had one general superintendent over all these men. He was one of the witnesses called and sworn in behalf of the defendant in error. He testified that he was superintendent of all its collieries in the neighborhood; that he had the general control of the management of all those collieries; that Col. Mason was the "outside foreman" and Mr. Reese the "inside foreman" of the Exeter shaft; that the duties of Col. Mason were to take charge of the coal when it came out; that he had charge of the brakemen, engineers, all outside men,—but was not superintendent of the inside work. It appears that Mr. Reese, called by the general superintendent "inside foreman," was also known as the "mining boss." He had the entire control of the inside operations in regard to working men employed and the ventilation, subject to orders from the general superintendent. The 8th section of the act of 3d of March, *supra*, requires the employment of a mining boss, who shall keep a careful watch over the ventilating apparatus, and all things connected with and appertaining to the safety of the men at work in the mine. Presumably these duties were assumed by him. Harris was an assistant under him, and to a considerable extent performed the duties of a mining boss. Mr. Davis was the "fire boss." His duties were to go down the shaft every morning before the men went to work, and to ascertain whether there was any gas, and report to the men before they went down. Lines was the engineer in charge of the fan and pump engine. He had control of the revolutions of the fan, under instructions from Col. Mason and Reese, and by their orders he "slowed down" the fan a few days prior to the explosion. Alexander Jones was the "driver boss." His business was to get cars for those needing them, and to see that the drivers properly discharged their duties in moving the coal.

Thus it is shown that the foreman and bosses and their assistants, including the engineer, miners and drivers, whether at work inside or outside of the mine, were all engaged in the same common work, and performing duties and services to effect the same general object; that purpose and that object was to take the coal from its natural bed, lift it to the surface and prepare it for market. It is true each had his allotted work to perform, yet, nevertheless, they were all fellow servants or fellow workmen, seeking to reach the one common object, and accomplish the one common purpose. Some of the employees were superior in the grade of their employment to Alex. Jones, others were inferior. Whether superior or inferior they, as well as he, were all under one common superintendent. In his hands, and in his alone, was the entire charge of the business placed by the company. His negligence might be negligence of the company. In this case no negligence is imputed to him, either in the selection or retention of unworthy employees, nor in using unsafe machinery. It therefore follows that the learned judge erred in charging that the company was liable for the negligence of certain of its foremen and bosses, which resulted in the death of another boss. The latter took on himself that risk, as a part of the ordinary risk of his employment, when he became engaged in the same common service with them. Under the most careful management mining is attended with danger, and persons engaging therein must be presumed to knowingly incur the ordinary risks incident thereto. Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where it has a general superintendent over him, who has power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person, and provide suitable and safe machinery. He is to "carefully watch" and "to see" for the purpose of protecting from danger, all men at work in the mines, says the statute. This, however, does not displace nor supersede his superior, to whom he may be required to report: *Howells v. Landore Steel Co.*, *supra*.

The conclusion we have reached is not in conflict with the law of *Mullan v. Philadelphia Steamship Co.*, 28 P. F.

Smith, 25. The facts show that to be a close case; it is very near the dividing line. Yet we thought the evidence sufficient to go to the jury under proper instructions. As stated in the opinion of our brother Woodward, there was some evidence tending to establish that the chief stevedore, whose negligence was alleged to have caused the injury, was clothed with the ultimate power and authority of the steamship company. It was further said the jury should ascertain to what extent the plaintiff and the chief stevedore were engaged in a common employment; yet it was expressly said "it is not designed in any way to impair or affect the rule settled in the cases on which the court below relied." Hence that case was not intended to overrule, nor did it profess to, any of the numerous decisions which have so clearly settled the law against the right of an employe to maintain an action against his master for the negligence of his fellow workmen.

We think the learned judge erred in excluding the evidence covered by the twelfth assignment. It bore directly on the question of Jones' negligence in entering the gangway in which his body was found. The point submitted by the plaintiff in error should have been affirmed. The fourth, sixth, eleventh and twelfth assignments are sustained. We can not say there is any substantial error in the other assignments.

Judgment reversed.

LAKE SUPERIOR IRON CO. V. ERICKSON, Adm'x.

(39 Michigan, 492. Supreme Court, 1878.)

Question calling for a conclusion of law. It is not error to disallow a question, the answer to which is a deduction rather than a fact; for instance: Was it not your business to be on the lookout for dangerous places? when the contention was whether the witness or some other party was liable for the consequence of a failure to keep such lookout.

Conflicting evidence as to apparent danger. Where there was a conflict of testimony as to whether or not there was apparent danger in working under a scale, the court refused to disturb the verdict of the jury, finding no negligence on the part of a workman who ventured under it.

Idem — Contributory negligence. It is not contributory negligence for an employe, who is in doubt about the safety of the place where he has to

work, to defer to the opinions and assurances of those who are supposed to know, and from their position are bound to have special knowledge as to whether it is safe or not.

It is culpable negligence to avoid keeping mining works as well protected as usual prudence would dictate.

¹ Liability of company for negligence of contractor—Facts of the case.

Where a company had its ore dug by short contracts under circumstances which showed that the company reserved control of the mine, and specially the timbering, the company is responsible for injuries to a workman employed by the contractor resulting from the fall of a scale in the winze being sunk by the contractor, such fall being the result of negligence.

Idem—Legal privity may sometimes exist between one contracting party and the servants of the other; as where the servants are exposed to risk from being obliged to work upon the former's premises under an arrangement which binds him to keep the premises in safe condition.

Injury to contractor's employe. Where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employes for injury in consequence of neglect of that duty.

Error to Marquette.

Trespass on the case. Defendant brings error.

W. P. HEALY and G. V. N. LOTHROP for plaintiff in error.

GEORGE W. HAYDEN, for defendant in error.

CAMPBELL, C. J.

Mrs. Erickson, the defendant in error, recovered a judgment in the court below, as administratrix of her deceased husband, Andrew Erickson, who was killed by a falling rock while engaged in working in the mine of the plaintiff in error, July 9, 1877.

It appears that Erickson had been employed the day before his death as one of a mining gang under the management chiefly of Gustav Stenson, who, with his partners, had taken a contract for mining and hoisting ore at ninety-five cents per ton for ore and twenty-five cents per ton for rock, this contract having been made July 1, 1877, for a month, and similar contracts having been made in previous months from the beginning of April. Erickson was employed by the day at one dollar and fifty cents

¹ *City of Tiffin v. McCormick*, 2 M. R. 194.

per day. The pay arrangement was that the company officers were to pay the men on the certificates of the contractors, deducting this pay from the final settlements.

These contracts were all let by Day and McEncroe as officers of the company, who had general charge for the company of the affairs in the mine.

The pit where these contractors were at work had been carried along the lode so as to leave the upper or hanging wall, which was at an angle of sixty-five degrees, exposed from twenty to twenty-five feet high, and not far from the same distance along the level, with no support or timbering of the hanging wall in that space. Erickson was engaged in sinking a winze or ventilating shaft from this level, and had sunk it about two feet and eight inches when killed. The rock which killed him fell from about half way up the hanging wall, and was just over the winze.

The chief controversy relates to the question whether this rock was previously in a condition which made it so apparently dangerous as to require removal or timbering, and if so, on whom, if any one, was the risk and responsibility. Several collateral questions arose also.

Upon a careful inspection of the record we do not think any questions become material except those which bear on the rights and duties of the various parties in connection with the mine. The other errors assigned do not appear to be founded on sufficient showings in the record. The only one urged by counsel was the rejection of a question put on cross-examination to Stenson asking him whether it was not his business and that of his associates to be on the lookout and watch for dangerous places. We think that when the terms and conditions of his contract were shown, this was rather a deduction than a fact, and he could not properly be allowed or required to answer it. He was not precluded from explaining fully the mutual understanding of the contracting parties as to what the contract was, or as to usage.

It was claimed in the argument, and this claim is based on the assignment of error, that on the whole case there was no ground of recovery. And as reasons for this position, several legal propositions are advanced, which are chiefly as follows: That there could be no recovery if Erickson was in the employ

of Stenson as a day laborer, or, if he was not under control of the company or its officers, and if Stenson and his associates were to mine and do their work properly, or if he was willing to work after such examination as was shown. And it was claimed in various forms that Erickson undertook all the risks that were established. It will be more convenient to refer to the points raised in the way adopted by counsel, than to pursue every subdivision separately.

There was evidence that the rock in question had been considered as dangerous some time before the contract of July, and that the attention of Day and McEncroe had been called to it. There was evidence of various attempts by sounding it with an iron bar to ascertain its safety. There was conflicting evidence as to some of the declarations of the mining officers on this subject. There was evidence on one side that they expressed themselves decidedly on its safety. There was also evidence to go to the jury that they retained the right to determine what large rocks should be removed, and what timbering or propping should be done. There was also testimony of the increase of water oozing from the seams, claimed to indicate a gradual loosening. The theory of plaintiff in error was, that the rock had been started by blasts from the winze, and that sufficient care had not been taken to examine it there after. It fell about two hours after a blast. Other matters of fact will be referred to in their place.

It is proper first to consider the respective positions of the parties. Day and McEncroe stood in the place of the mining company in making these contracts. There was no employment relation between them and Erickson, who was laboring under the contractors. So far as this changed the relative liabilities of the parties it must operate in this case. But while there are cases in which there is no duty or legal privity between principals and the servants of those who contract with them, this lack of privity is not universal and absolute. If, for example, a railway company were to contract with a firm of car builders to build cars according to given plans in places under the entire control of the builders, there could be no possible corporate responsibility for injuries received by workmen in their callings. But on the other hand it might be quite possible for men to be employed in piece-work in the

shops of such companies where they retained more or less control, when, for the failure of a corporate duty, the workmen or strangers injured by that failure, might have a cause of action for the wrong directly against the corporation, although it had not employed them. The case of *The City of Detroit v. Corey*, 9 Mich. 165, is a case where the corporation was held liable for neglect of a contractor in not properly guarding against danger from an excavation in a public street. The same principle was applied in *Darmstatter v. Moynahan*, 27 Mich. 188; *McWilliams v. Detroit Central Mills Co.*, 31 Mich. 274; *Gardner v. Smith*, 7 Mich. 410; *Bay City & E. Sag. R. R. Co. v. Austin*, 21 Mich. 390; *Continental Imp. Co. v. Ives*, 30 Mich. 448; *G. R. & Ind. R. R. Co. v. Southwick*, 30 Mich. 444.

No doubt the range of the owner's responsibility is very much less in most cases where contractors are employed and have their own servants at work, than where the servants are employed by the proprietors. The main question in such cases is whether any duty remained which sprang from the proprietor's own position, and from the violation of which the damage arose. In the present case there are two principal inquiries, which are, *first*, whether the death of Erickson was due to the fault of the mining company in not doing what they were bound to do for the protection of those working in their mines; and *secundo*, whether Erickson himself was responsible for running the risk which proved fatal. Of course both of these questions are aside from the third question, whether the death was accidental and not due to the fault of any one.

The court below told the jury that there could be no recovery in this case if the duty was on Stenson and his associates to guard against such risks, and that the same was true if Erickson contributed to the injury by his own want of care. They were also told that there was no ground of recovery if the falling of the rock was not under circumstances which showed that the company had been guilty of such negligence as showed such want of care and caution as prudent persons would not be guilty of. They were particularly directed that unless the conduct of Day and McEnroe was thus negligent and the cause of the mischief, there could be no recovery, and that the company would be liable for their neglect or misconduct, and not for that of any one else appearing in the case.

We think the court was correct in holding that Day and McEncroe represented the company for this purpose. They appear to have had entire control of all the business that is involved in the record. And we think there is no room to question the propriety of these rulings if they were applicable, and not neutralized by other instructions. In this connection it is proper to notice one of the special assignments of error, which is calculated to give a wrong impression. The court is represented as telling the jury to inquire whether the company used such care and precautions as "relieved them from liability in this suit;" and it is claimed this left a question of law to the jury. But the next sentence of the charge explained what would or would not make them liable. Isolated sentences can not be allowed to be considered apart from their context. The instructions were not so separated as to create confusion, but were really but a single and correct ruling.

We think that unless the case was one too plain to go to the jury on that point, it was properly left to them to say whether the accident occurred without any one's fault or neglect. It is not for us to draw inferences of fact in such cases. There was certainly evidence to go to the jury indicating that there should have been measures taken by some one to either remove or prop the rock that fell.

We think also that there was properly before them a question whether Erickson himself was guilty of contributory negligence. A great deal of testimony was introduced to show that there was no apparent danger which could be discovered and that the company was justified in treating the rock as safe. There was also much testimony to the contrary. The place was one not easily examined by the ordinary mining lights. If there was no apparent danger it was not recklessness to work under this rock; if, on the other hand, there was real danger and Erickson was informed of it on the day he entered the mine, there was nevertheless evidence that those about him, who had practical knowledge of the mine, in which he was a stranger, acted as if they did not think so, and the guards usually to be expected against danger were absent. The duty of examining such places after a blast is confined by the testimony to dangerous places, and not made out clearly even there as devolving on Erickson. The jury have necessarily found he

was not careless, and there was testimony on which they could lawfully act.

The question next arises whether the responsibility of protecting Erickson from such a danger, if supposed to exist, rested on his immediate employers. This was also dependent on testimony and involved some inquiry into their relations with the company.

Does it then appear so as to bind the court and jury that the contractors in this particular service had the responsibility confined to them of guarding their workmen from the probable dangers of their employment? There is no dispute in this case upon the general principle of law, that a responsibility lies somewhere to prevent workmen from being exposed, without such protection as is reasonably required in a dangerous business. The law is very clear that it is culpable negligence to avoid keeping mining works as well protected as usual prudence would dictate, and there is no doubt that a common danger in mines is from falling rocks. The hanging wall being on an angle—in this instance, of sixty-five degrees—with the level, any lack of cohesion in its parts must lead to the fall of such part of it as is seriously loosened, and that fall must be hastened by the concussion of the air or the blows of flying rocks thrown against it by blasting below and near it. In the present case the rock which fell being directly above the winze, and only about twelve feet from its mouth, every blast in that shaft would necessarily throw more or less rock against this sloping roof; and this must continue until the shaft is either finished or opened to such a depth as to deaden or destroy the upward force of the explosions.

The fact that this rock was considered dangerous and so reported several weeks before the accident, and the further fact, if true (and the jury probably believed it), that there was a perceptible increase in the dangerous symptoms, certainly imposed a duty of either removing the real danger or using such means as are generally deemed adequate to determine whether any danger existed. The further fact that the hanging wall was composed of a species of rock whose thickness was not generally found uniform, and which was sometimes thin enough to possess no very great resisting power to shocks or disintegrating agencies was one which could not be left out

of view by any prudent calculation. A broad expanse of some twenty-five feet square of rock only supported by its own cohesive power from falling, may, according to the testimony, have weak points where it may give way, unless propped, or unless the unreliable mass is removed. There was testimony, which it is not our province to pass upon, which indicated, if believed, that no reliable test could be found for determining the solidity of the rock when water was escaping through such seams as existed in this wall.

We think there was a question fairly open, whether neglect to guard against the accident was not culpable. The jury have found it was.

If so, the only remaining question is, whether the jury had proof before them whereby they could lawfully hold the company to this responsibility.

Under the contracts shown by the proof, the contractors had nothing to do with planning the mine or selecting their working ground, unless with very small discretionary choice. The shafts and levels and the winze must necessarily have been determined on by the owners of the mine, and the mining gang worked on short contracts. Their business, except in sinking the winze, was merely stripping the lode of its ore, and the winze was apparently, as it must usually be, down the lode. The pay for getting out dead rock was but little beyond one fourth that of getting out ore, and work in the rock outside of the lode was not contemplated. They testified, and the jury must have believed them, that the company reserved the power of determining when and where dangerous rock in the wall should be removed, if requiring removal by blasting, and of locating the supporting pillars, or placing timbers to prop the wall. Such timbering would be expensive, and is not provided for by the contracts which are confined to rock and ore blasting and removal. Either the mine must be unguarded, or else, on this state of facts, the company must guard it.

Under such circumstances it is very plain that the company, being the owners of the dangerous property, and inviting men to work on it, their responsibility for its protection can not be changed by the fact that the work is done by the ton, instead of by the day, or by the fact that the men who contract with

them have laborers of their own. By employing men to act for them in either way, they hold out the assurance that they can work in the mine on the ordinary conditions of safety usually found in such places. They guaranty nothing more than is usual among prudent owners, and they do not insure against that which is purely accidental. But they do tacitly represent that they have not been, and will not be reckless themselves.

If men choose with their eyes open to run into danger, they may forfeit claims to redress. But it can not be considered reckless in men who are in doubt upon a matter which can not be determined absolutely, to pay some regard to the opinions and assurances of those who are supposed to have, and by their position are bound to have special knowledge called for by their larger responsibilities. In the present case, the assurances of safety given by the mining agents can not be disregarded, and were rightly subject to consideration by the jury.

We think the jury were very carefully and correctly instructed concerning their duty, and that there was testimony which warranted their verdict.

There is no error in the record, and the judgment must be affirmed with costs.

The other justices concurred.

DELAWARE AND HUDSON CANAL Co. v. CARROLL.

(89 Pennsylvania State, 374. Supreme Court, 1879.)

Mining bosses and miners fellow servants—Negligence. Under the provisions of the Mine Ventilation Act of March 3, 1870, "mining bosses" and "miners" are fellow servants, and where the death of the latter is caused by the negligence of the former, the owner of the mine is not responsible therefor.

Idem—Mining bosses appointed under statute. The fact that said "mining bosses" are appointed under an act of assembly, which prescribes their duties, does not change this relation of "fellow servant" where it is shown the requirements of the act in regard to their selection have been complied with, and it does not appear they were incompetent, or

that there was negligence on the part of the mine owner in their employment.

Amendment by adding plaintiffs. The action to recover damages for the death of the miner was brought by his widow, within a year, as required by the act of assembly. After the expiration of the year it was amended so as to bring in the children as plaintiffs, but no new cause of action was introduced. *Held*, that this amendment was properly allowed.

Error to the Court of Common Pleas of Luzerne County.

Case by Mary Carroll, the widow, and minor children of John Carroll, deceased, against the Delaware & Hudson Canal Company, to recover damages for injuries resulting in the death of said John Carroll, alleged to have been caused by the negligence of the company.

John Carroll was a miner employed in the colliery of the company. On the 26th of May, 1873, an explosion occurred which caused his death. Suit was brought in the name of the widow the 8th day of November, 1873, and on the 23d day of November, 1875, a rule was granted to show cause why the children of decedent should not be added as plaintiffs in the case. This rule was made absolute 1st June, 1877, and the names of the children were added.

There were engaged in the mine at the time of the accident a mine boss, John P. Moore, two fire bosses, James McDonald and Matthew Gray, and the usual miners and laborers. The court treated the case as if brought under the provisions of the act of March 3, 1870, "To provide for the health and safety of persons and property in coal mines." The portions of the act material to this case are as follows. The eighth section is in these words :

"The better to secure the ventilation of every coal mine and colliery, and provide for the health and safety of the men employed therein, otherwise, and in every respect the owner or agent, as the case may be, in charge of every coal mine or colliery, shall employ a competent and practical inside overseer, to be called mining boss, who shall keep a careful watch over the ventilating apparatus, over the air ways, the traveling ways, the pumps and sumps, the timbering ; to see, as the miners advance in their excavations, that all loose coal,

slate or rock overhead is carefully secured against falling; over the arrangements for signaling from the bottom to the top, and from the top to the bottom of the shaft or slope, for the purpose of talking through; and all things connected with and pertaining to the safety of the men at work in the mine. He or his assistants shall examine carefully the workings of all mines generating explosive gases, every morning, before the miners enter the coal mine or colliery, and shall ascertain that the mine is free from danger, and the workmen shall not enter the mine until such examination has been made and reported, and the cause of danger, if any exist, be removed; and he or his assistants shall also, every evening when the workmen leave the mine or colliery, go over the mine and see that the doors or passage ways are all properly closed, and that all the air ways are free and unobstructed to the passage of air through them; and it shall be the duty of the mining boss to measure the ventilation at least once per week, at the inlet and outlet, also at or near the face of all gangways; and all measurements to be reported to the inspector once per month."

The concluding or twenty-fourth section is as follows:

"For any injury to person or property, occasioned by any violation of this act, or any willful failure to comply with its provisions, by any owner, lessee or operator of any coal mine or opening, a right of action shall accrue to the party injured, for any direct damages he may have sustained thereby; and in any case of loss of life, by reason of such violation, or willful failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained."

The duty of the fire boss, who was an assistant of the mining boss, was to examine the chambers every morning before the men commenced work, and ascertain whether fire-damp was present in the chamber. There was no evidence tending to prove that the mining boss or the fire bosses were incompetent to discharge the duties of their respective positions, or that there was any negligence on the part of the company in their employment.

The plaintiffs alleged that Moore, the mining boss, was negligent; that on the morning of the accident he failed to

do his duty in a department which was exclusively under his oversight and control; that he permitted dangerous and explosive gases, which had accumulated in a breast worked by Carroll, to remain there without warning Carroll of their presence; that when the latter came to his work, on the morning referred to, he met the fire boss, James McDonald, who was an assistant of the mining boss, at the shanty of the latter in the mine, and near the base of the shaft, who told him that his breast or chamber was all right; that Carroll lighted his lamp, which was uncovered and called a naked light, and proceeded into his chamber; that immediately thereupon an explosion of gas took place, burning Carroll to such an extent that he died a few days afterward.

The defendants, while admitting that Moore was the mining boss and McDonald was his assistant, and that a quantity of explosive gas had accumulated on the morning referred to, in the breast or chamber where Carroll was in the habit of working, alleged, on the contrary, that Carroll was warned of the fact, and instructed not to go in there until the assistant, or fire boss, had brushed it out; that notwithstanding this warning and instruction, Carroll lighted a naked or uncovered lamp, and in the absence, both of the mining boss and his assistant, and without their knowledge, went into the forbidden chamber, thus causing the explosion which cost him his life.

John Dakin, a witness for the plaintiffs, testified: "Carroll and me went over together to the fire boss, McDonald; Carroll went up to him and asked him how his place was this morning. 'It is all right, John,' says he, 'there is no danger.' Carroll went right up to his place then; I just hadn't time to work or anything, only just took off my coat at the box, when a little door tender came running and said, there is two men burned." * * *

Carroll was burned so badly that when Dakin was carrying him "the chunks of flesh fell off into my hands." Carroll said, about a half hour after he was burned, "But wasn't that (the fire boss) a terrible man to tell me that there was no gas in there—to send me in to get roasted!"

McDonald testified that he was down at the shanty, at the foot of the shaft, on the morning of the accident, when John

Carroll came there, and that he told Carroll there was some fire in his breast, or chamber, and that he must not go in there until he had brushed it out, which he would do as soon as he had attended to some other men who were in waiting.

Matthew Gray, another witness on the part of the defense, said that he was present at the scene of the disaster soon after it occurred, when John P. Moore, the mining boss, came up, and seeing the condition of Carroll, the mining boss asked him "how it was caused." Whereupon Carroll replied that "it was his own fault, and that he had nobody but himself to blame for it." Moore himself testified that he came there immediately after the explosion, and seeing Carroll standing on the outside of the gangway, he said to him, "John, how is this? did not the fire boss tell you there was fire in your breast?" Whereupon Carroll replied, "Yes, I have nobody to blame but myself."

The verdict was for plaintiffs for \$4,000. The defendants took this writ and made the following assignments of error:

1. The court, Harding, P. J., erred in charging the jury as follows:

"The action is brought under the provisions of an act of the General Assembly, passed March 3, 1870, entitled 'An act to provide for the health and safety of persons and property in coal mines.'"

2. In charging as follows:

"They" (the company) "employed Mr. John P. Moore as their mining boss, and upon him was imposed the various duties enumerated in the section of the act of assembly to which I have called your attention. These duties constituted a distinct branch of the mining operations carried on in that shaft."

"The mining boss was the agent of the company, appointed especially to oversee the workings and to maintain all the instrumentalities indicated by the law as necessary to insure the health and safety of the workmen. He had entire charge of this branch of the business, and hence, if he was guilty of neglect of duty, and the life of John Carroll was lost in consequence, the widow and children, plaintiffs here, may recover against the common employer. The negligence of the agent, or, as in this case, the negligence of the mining boss, is the

negligence of the employer, and the latter is responsible therefor."

3. In charging as follows:

"Was the mining boss, John P. Moore, or his acknowledged assistant, James McDonald, guilty of negligence on the morning of May 26, 1873?"

4. In charging as follows:

"If the testimony of John Dakin is true, the plaintiffs are entitled to recover."

5. The court erred in their answer to defendants' fourth point, viz.:

"The action in this case, so far as the children of the deceased are concerned, not having been brought within one year after the death of Carroll, can not be sustained as to them, and no other or larger verdict can be found against the defendants than might be rendered if the widow were the only party on the record as plaintiff."

The answer thereto was: "That proposition we negative. The action was brought within the year in the name of the widow. After the expiration of the year, it was amended so as to bring in the children. No new cause of action was introduced; hence, if the plaintiffs are entitled to recover, they are entitled to recover generally, without any difference; certainly without the difference noted in the point."

6. The court erred in permitting the addition of the minor children of John Carroll, as co-plaintiffs with Mary Carroll, widow, in whose name alone the suit was originally brought, after more than a year from the date of the death of John Carroll had expired.

7. The court erred in their answer to the defendants' fifth point, viz.:

"Under all the testimony in the case, there was negligence on the part of Carroll which contributed to his injury, and therefore the verdict should be for the defendants."

The answer thereto was: "We have clearly stated to you, in the general charge, under what circumstances the verdict should be for the defendants. We can not affirm this point."

8. The court erred in their answer to defendants' sixth point, viz.:

"There is no evidence in this case to establish the negligence

of the company defendant; and if the fire boss was guilty of any negligence or dereliction of duty, then it was the negligence, not of the company, but of a co-employee of the deceased, and therefore the plaintiffs can not recover."

The answer thereto was: "We negatived that point in the general charge; we stated our views at length in respect to the particular matter involved; we negative it again."

STANLEY WOODWARD and ANDREW T. McCLINTOCK, for plaintiffs in error.

HENRY W. PALMER, CHARLES PIKE and JOHN LYNCH, for defendants in error.

PAXON, J., delivered the opinion of the court.

This was an action on the case brought by the widow and minor children of John Carroll, deceased, against the Delaware & Hudson Canal Company, to recover compensation for injuries to the said John Carroll, resulting in his death.

We are unable to say that the court below erred in its charge to the jury, as contained in the first specification, that the action was brought under the provisions of the act of assembly, passed March 3, 1870, entitled "An act to provide for the health and safety of persons and property in coal mines." The declaration is not given, but we infer from the points submitted, the charge of the court, and the manner in which the case was tried, that the action was under the act of 1870. The plaintiffs below evidently so regarded it, and it is no hardship to them to dispose of the case upon that theory.

Assuming then that the action was so brought, what are the responsibilities of the defendants under the act? The twenty-fourth section thereof provides (see Pamph. L. 1870, p. 12), that "For any injury to person or property occasioned by any violation of this act, or any willful failure to comply with its provisions, by any owner, lessee or operator of any coal mine or opening, a right of action shall accrue to the party injured for any direct damages he may have sustained thereby; and in case of loss of life by reason of such violation or willful failure, aforesaid, a right of action shall accrue to the widow

and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained."

The duties enjoined by said act, so far as they relate to this case, are contained in the eighth section, which provides that "the owner or agent, as the case may be, in charge of every coal mine or colliery, shall employ a competent and practical inside overseer, to be called a mining boss," etc. The section then goes on at considerable length to define the duties of the mining boss, which are in brief to keep a careful watch over the ventilating apparatus and examine daily the working of all mines generating explosive gases, and to see that they are in a safe condition before the men enter them in the morning, etc., for the better protection of the workmen from danger. The defendants employed one John P. Moore as their mining boss, who was in charge of the works at the time the accident occurred by which Carroll lost his life. The contention of the plaintiffs is that Moore, the mining boss, and James McDonald his assistant, were guilty of negligence, and that such negligence was the cause of the injuries which resulted in Carroll's death; and that the defendants are liable in this action for such negligence.

It is too plain for argument that if the defendants have not violated said act they are not responsible. In what respect have they transgressed its provisions? They employed a mining boss, as required by the act, and there is no allegation that he was not a competent and practical man. No attempt was made to show that the defendants were guilty of negligence in employing a mining boss; that they employed an incompetent man knowing him to be so, or employed him without knowledge of his capacity or fitness, or without making such inquiry, as to his qualifications, as a man of ordinary prudence would do. The defendants having placed a mining boss in charge of the works are not in default. Much less have they been guilty of a violation of the act, which is the ground and the only ground upon which a recovery can be had. The negligence of the mining boss, if it exists, might make him liable to the plaintiffs; it certainly can not render the defendants liable under the act of assembly. We think, therefore, there was error in those portions of the charge contained in the second, third and fourth specifications.

The fifth and sixth and seventh specifications are not sustained. The objection to joining the minor children as co-plaintiffs with the widow, notwithstanding more than a year had elapsed since suit brought, is purely technical, and without merit. The action was commenced by the widow within one year from the time the injury occurred. Bringing in the children subsequently, by amendment, introduced no new cause of action, and worked no injury to any one, even if the suit were brought under the act of 1855. The aforesaid act of 3d March, 1870, contains no provision limiting the time within which suit must be brought for a violation of its provisions. In regard to the seventh specification, it is sufficient to say that we do not think the court was required to say under the evidence that Carroll was guilty of contributory negligence.

It remains to consider the eighth specification, which refers to the defendants' sixth point. The learned judge negatived it both in his general charge and in his answer. We think it was error to decline the point whether we regard this action as brought under the act of 1870 or 1855. If under the former, the defendants are not responsible for the negligence of the mining boss, as has already been stated; if under the latter, the plaintiffs are met with the difficulty that the mining boss was a co-employee of the deceased. There is no room for the allegation that a mining boss under the Mine Ventilation Act of 1870 is an agent of the mine owner or a co-employer. He is clothed with no powers of engaging and discharging miners and laborers at pleasure. He is merely a fellow servant with the miner. He is nowhere in the act designated as the agent of the owner of the mines. His duties are specified in the same manner that the duties of the engineer are specified in the 16th section, and as the duties of other employes are defined in various other sections; he has no general power of control. His duties are confined to special matters. That they are different from those of others of his fellow co-laborers, or even that they are of a higher grade, does not matter: *Caldwell v. Brown*, 3 P. F. Smith, 453; *Wright v. N. Y. Central Railroad Co.*, 25 N. Y. 565; *Morgan v. Vale of Neath Railroad Co.*, Law Rep., 1 Q. B. 149. This view is not in conflict with *Mullan v. The Steamship Co.*, 28 P. F.

Smith, 25. There the hands employed were under the charge of John Corcoran, the chief stevedore. He engaged and discharged them at pleasure. Under the evidence it was held that it was for the jury to pass upon the relations between the stevedore and the laborers, and to find whether they were engaged in a common employment. In the case in hand, the duties of the mining boss are fixed by an act of assembly. It is not, therefore, essential that a jury should fix the relations between the mining boss and the deceased.

The case of *Howells v. The Landore Steel Co.*, Law Rep., 10 Q. B. 62, is directly in point. There the defendants were the owners of a colliery within the Coal Mines Regulation Act of 1872 (35 and 36 Vict. Ch. 76), and they had appointed a certified manager as required by section 26. A miner employed in the colliery was killed by an explosion of fire damp, caused by the negligence of the manager. It was held "that the fact that the manager was appointed pursuant to the act, did not put him in any different position from that he would have held had he been simply appointed manager, and that he was a fellow servant with the deceased, and the defendants were, therefore, not liable to the representatives of the deceased for his death."

Judgment reversed.

MONEY V. THE LOWER VEIN COAL CO.

(55 Iowa, 671. Supreme Court, 1881.)

¹**Miner—Risk of falling scales.** A miner who knows, or by the exercise of ordinary care might have known, of the unsafe condition of a coal roof, and continues to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, assumes the risk and can not recover in case of injury from falling scale.

Duty to tap roof. Instruction embodying duty of miner to tap the roof and judge of its safety, asked for by defendant, considered and approved.

¹ Liability for falling bodies: *Ashworth v. Stanwix*, 9 M. R. 676; *Mellors v. Shaw*, 9 M. R. 680; *Hall v. Johnson*, 9 M. R. 686; *Collier v. Steinhart*, 10 M. R. 1; *Lake Superior Co. v. Erickson*, 10 M. R. 40; *Griffiths v. Gidlow*, 10 M. R. 639.

Appeal from Boone District Court.

The plaintiff brings this action to recover for injuries received while working as a miner in defendant's coal mine. He alleges that the defendant was negligent in failing to support the roof of the entry where he was at work. The trial was to a jury and resulted in a verdict and judgment for the plaintiff in the sum of \$800. The defendant appeals.

KIDDER & CROOKS, for appellant.

HULL & WHITAKER, for appellee.

DAY, J.

The plaintiff is an experienced miner, having been engaged in the business for thirty years, although not acquainted with the formation of roof found in defendant's mine. At the time of the injury he had been employed in defendant's mine eight or nine days. He was engaged in breaking a room off of a branch of the main entry. Whilst he was thus employed a portion of the cap rock forming the roof of the entry, the weight of which was variously estimated at from three or four to seven or eight hundred pounds, fell upon him, breaking his left thigh. The evidence shows that the business of mining is a hazardous one. Portions of the roof often fall. The miners are in the habit of frequently tapping the roof with their tools for the purpose of determining by the sound its condition. Evidence was introduced tending to show that this was necessary to their safety, and that it is their duty to watch and ascertain the condition of the roof in the particular locality in which they may be employed. Evidence was further introduced that the effect of opening a room on the side of an entry is to weaken the roof; that it becomes necessary to support it with props; that the company furnishes props, and it is the duty of the miner to put them up; that the plaintiff was directed to prop the roof; that he thought the cap rock was safe where he was working and used his own judgment as to its safety.

I. The court gave the jury, amongst others, the following instructions:

"4. If the injury was caused by the unexpected fall of cap

rock from the roof of the mine, and neither the plaintiff nor defendant knew of the danger, and could not have discovered it by the use of ordinary care and prudence, that it was an unavoidable casualty for which there is no liability, and plaintiff could not recover.

“5. The law requires that the underground manager of every mine must be a practical miner, or one acquainted with the working and management of mines. If you find, from the evidence, that the defendant knew of the danger to which plaintiff was subject, or could have discovered it by the use of ordinary care and caution, or if the fact that the entry was left without support other than the side walls to prevent the falling of the roof was unusual and dangerous, defendant would be liable.

“6. If the mining company used ordinary care and prudence in the construction of the entry where plaintiff was working at the time of the accident; that the roof of the entry was supported as well as would be required by the rules and customs of ordinarily careful and skillful miners under like circumstances, and there was no reason to apprehend danger which was or could have been discovered by ordinary care, or if the plaintiff knew of the danger, and defendant did not, and he could have avoided it by ordinary care, he could not recover.”

These instructions do not properly present the law of this case. The propositions which they embody are as follows: 1. If neither party knew, or by the use of ordinary diligence could have discovered, the danger, the accident is an unavoidable casualty for which there is no liability. 2. If the defendant knew, or by the use of ordinary care could have discovered the danger, it is liable. 3. If the plaintiff knew of the danger and could have avoided it by ordinary care, and the defendant did not know of the danger, plaintiff can not recover. Under these instructions the only condition of defendant's liability is knowledge of the danger, or the ability to discover it by ordinary care. The only condition of non-liability is lack of knowledge on the part of both parties, or knowledge on the part of plaintiff in the absence of knowledge on the part of the defendant. The true rule is that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe

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condition of the roof, and he continued to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk and can not recover. See *Way v. Illinois Central R. R.*, 40 Iowa, 341; *Muldowney v. Illinois Central R. R.*, 39 Id. 615; *Kroy v. C., R. I. & P. Railway*, 32 Id., 357; *Greenleaf v. Illinois Central R. R.*, 29 Id. 14; *Shearman and Redfield on Negligence*, 99.

II. The defendant assigns as error the refusal of the court to give the following instruction:

"If the plaintiff knew of the condition of the mine where he was working, and observed its condition, and was an experienced miner, and said mine appeared safe, and he so thought, and it was his duty to judge and determine, and not upon the judgment of another, and if he could, by tapping the roof, and by observing the same, judge of its safety as well as the other and competent employees of the defendant, then he can not recover in this action."

Under the evidence introduced, this instruction, or one embodying substantially its propositions, should have been given.

Reversed.

McGOWAN V. THE LA PLATA MINING AND SMELTING COMPANY.

(3 McCrary, 393. U. S. Circuit Court, District of Colorado, 1882.)

¹ Duty of master to inform servant of danger incident to occupation.

The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of the facts.

No implied knowledge of danger from contact of hot slag with water.

The law will presume, within limits, that every one has knowledge of certain destructive forces in nature, and accepts employment with reference to them—as that fire will burn, water drown, the law of gravitation, etc. But many scientific facts tending to endanger life are not within the intelligence of ordinary men. A laborer employed to re-

¹*Baxter v. Roberts*, 44 Cal. 187; 13 Am. R. 160; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. R. 28; *Smith v. Oxford Iron Co.*, 2 M. R. 208.

move hot slag from a furnace in proximity to water, will not be presumed to know the dangers which may result from the explosion sure to be caused by the contact of the hot slag and the water.

Idem—Knowledge of facts and knowledge of implied dangers distinguished. It is not so much a question whether the party injured has knowledge of all the facts in his situation, as whether he is aware of the dangers that threaten him.

Damages—Amount of. The verdict will not be set aside for “excessive damages” when it is not apparent that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence.

Tort for injuries received in defendant’s service. In May last defendant was engaged in smelting ores at Leadville, and plaintiff was employed to assist at one of its furnaces as “inside helper.” There were several furnaces in the works, the one at which plaintiff served being known as No. 4. This furnace had two taps for drawing off slag, differing in that respect from the others, which had but one. The slag, in a molten condition, was drawn into pots, which were supported between wheels, with a tongue attached, for moving the pot and contents without the building. After it was filled with slag the tap was closed and the pot was drawn out about eighteen inches, and allowed to stand there until the slag cooled sufficiently to form a crust, when it was moved to the dump outside the building. To support the wheels under the taps two iron plates were placed parallel with each other. They were three or four feet in length. The slag pot was kept in position under the tap by the spout, which extended over the rim, and when drawn out there was a foot post under the tongue to support it. For convenience in moving the pot, this foot post was made shorter than was required to keep the pot level, and when drawn out from the tap, as before explained, it was necessary to support the foot post on a block of some kind in order to keep the pot level. At some of defendant’s furnaces iron plates were used for that purpose. At one there were bricks laid in mortar. At the furnace No. 4, where plaintiff served, there was one brick or perhaps two bricks; whether there was one brick or two bricks laid one on top of the other was left in doubt; the plaintiff testified that there was one brick.

Just under the tap at all the furnaces there was a small sump usually filled with water, which received the droppings

of slag from the tap. Water, supplied through hose with some force, was used at all the furnaces after drawing off slag and bullion, apparently to cool the furnace and the surroundings. As described by the witnesses, the use of water was "to wet down the breast of the furnace." In front of the furnace No. 4 there was a slight depression in the floor of the furnace, extending from the tap somewhat further than the iron plates before mentioned, perhaps four or five feet from the furnace, in all. At the time plaintiff entered the service, and thereafter until the injury, this depression was filled with water, so that there was something like a pool of water there, deeper at some places than at others, as the floor was uneven, but not very deep in any place—perhaps one or two inches of water at some places, and very little at other places. The water came from "wetting down the breast" too freely, or from leaks in the hose. In either case it was within the control of the "inside helper."

The furnace was in charge of a furnace-man, who attended to the business of smelting. The "inside helper" was his assistant to tap the furnace, draw the slag, close the tap, draw the slag-pot to the door, "wet down the breast," and the like duties. There was evidence tending to prove that he had charge of the tools about the furnace, and that there was a barrel at hand to catch the flow of water from the leaky hose if it should be placed in the barrel. The inside helper could take any steps necessary to prevent the water from gathering in front of the furnace, by preventing it from flowing there, or by cutting a drain to carry it off.

On the whole evidence, however, it was plain that the furnace was in charge of the furnace-man and the helper was subject to his orders. In control of all the furnaces, there was a superintendent, who gave close attention to all that was done, and there was a general manager of the concern, whose function was not clearly shown.

Plaintiff, having no experience in such matters, was employed by the superintendent to work as "inside helper," and was shown how to draw off the slag and move the slag-pots, and to perform other services about the furnace. But nothing was said to him about the water in front of the furnace, or the danger incident to its presence in that place.

In the third shift, which was probably the third day of his service, plaintiff drew out from a tap a pot of slag, and attempted to place the foot post on the brick, or bricks, before mentioned. By some mischance this was not done, and the foot post came to the floor, tilting the pot forward, and spilling the hot slag into the water. This caused an explosion of great force, by which plaintiff was injured; his clothes were set on fire, and his person—his face in particular—badly burned. The greatest hurt was to the eyes, which, plaintiff testified, were not yet well. He was blind for sixteen days and confined to the hospital about two months; resumed work as a teamster about the middle of August.

In the original complaint, the negligence relied on was the failure to provide a slab or block for the foot post of the slag-pot to rest on. By amendment the further ground was added that defendant allowed water to collect in front of the furnace, "the collection of which in said place rendered it extremely dangerous in removing and taking away the molten slag from said furnace; that plaintiff was inexperienced in such matters, and was not aware of such danger; and that said defendant did not, in any manner, inform plaintiff of such danger, or warn him against the same, although said defendant well knew of such danger."

The court advised the jury to find whether the defendant was negligent in not warning the plaintiff of the danger of spilling hot slag in the water in front of the furnace. If it was defendant's duty to notify plaintiff of the consequences that might be expected to proceed from allowing the slag to fall into the water, and he was not notified, the defendant would be liable in damages for any injury happening to plaintiff, in the manner detailed by witnesses. If the water in front of the furnace was dangerous to the workmen, by reason of the liability to spill the slag into it, was it defendant's duty to give warning of such danger? If plaintiff had been injured by spilling slag on his foot, or in such a manner that it would flow against his person, he could not recover, because that was a danger which he must foresee and guard against at his peril. Defendant could be held only on the theory that there was danger from allowing the hot slag to fall into the water, of which defendant was informed and plaintiff was not, and that

defendant owed to plaintiff a duty to inform him of the danger, and that duty had not been performed

As to the measure of damages, plaintiff could have compensation only for his illness—the pain and suffering proceeding from the injuries. He could have nothing for the loss of time, as he had not shown its value; and nothing for medical and other attendance, as he had not shown any expenditure in that behalf.

Defendant excepted to the charge and to the refusal of the court to give certain instructions submitted.

The jury returned a verdict for plaintiff assessing damages at \$3,250.

Defendant filed this motion for new trial, alleging error in the charge, and that the damages are excessive.

J. D. MURPHY, T. A. GREEN, for plaintiff.

J. F. FREUAUFF, for defendant.

HALLETT, J.

That a master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of such facts, seems to be conceded.

A lot owner employed a carpenter to build for him, but did not inform the carpenter that his title to the lot was contested. The carpenter, pursuing his labor on the lot without suspicion of danger, was attacked by the parties claiming adversely to the employer, and severely injured. On this the employer was held liable in damages for his omission to notify his servant of the danger impending: *Baxter v. Roberts*, 44 Cal. 187.

A miner employed to sink a shaft was not informed of a crack or opening in the side of the shaft, of which his employer had knowledge. The shaft caved in and injured the miner, and his employer was held liable for his negligence in not giving notice of the crack in the shaft: *Strahlendorf v. Rosenthal*, 30 Wis. 675.

But it is contended that the rule can not be applicable to

the case at bar, as it relates only to *facts* withheld from the servant, and not to instruction in the principles of natural philosophy. The water in front of the furnace, and the act of overturning the hot slag, may have come of the negligence of the plaintiff. Indeed, the evidence points to that conclusion. And the explosion which followed was the natural result, of which plaintiff should have been informed; or, at all events, defendant was under no duty to inform him.

This is the argument against the verdict. And certainly, within limits, the law will assume that every one has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind in the ordinary course of his life—that fire will burn; that water will drown; that one may fall off a precipice, and the like. Recently in this court it was said of one who mounted a push-car on a railroad, and went down a steep grade, to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves.

And in this case the jury was told that the plaintiff could not have recovered for a burn caused by spilling the slag on himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion; and, if fully informed, how many of them, when put to service at a smelting furnace, would recall their learning without a suggestion from some source?

What the law will presume as to the knowledge of men in matters of this kind, may, in some instances, be a question of difficulty; and certainly it would not be easy to lay down a general rule on the subject. In the face of the plaintiff's testimony, however, to the effect that he had no knowledge or information of the danger to which he was exposed, it would be manifestly unjust in this instance to hold, as matter of law, that he had notice of it.

After all, it is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What

avails it to him that all the facts are known, if he can not make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed. So in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 573, the machinery which caused the injury was open to view, and probably it was seen by the party injured. But the danger of the position was not explained as was necessary for the protection of one who had no knowledge of it. In another case in the same court the rule was applied to an adult person who had full knowledge of all the facts out of which danger arose, but the danger itself was not pointed out to him: *O'Connor v. Adams*, 120 Mass. 427. The correct rule as to defendant's liability was announced at the trial, and as to the damages, the amount is not so large as to challenge the attention of the court. To one in plaintiff's situation the sum is considerable without doubt, but the injury was great and the suffering intense. It is impossible to say that the jury acted from prejudice or passion or that they passed the limits of fair discretion on the evidence.

The motion for a new trial will be denied.

1. An agent is not a "servant" under the Stockholders' Personal Liability Act: *Hill v. Spencer*, 1 M. R. 414; *Dean v. DeWolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Id. 463.

2. Injury of workman from fall of bucket in pit: *Griffiths v. Gidlow*, 3 H. & N. 648; *Post NEGLIGENCE*.

3. Owner of lands liable for injuries done by contractor to third persons in prosecuting a work which is in itself a nuisance; *contra*, if not a nuisance: *Cuff v. Newark & New York R. R. Co.*, 35 N. J. L. 17.

4. Action for wages upon dismissal of servant without notice, distinguishing between special declaration on the agreement and the common count for work and labor: *Hartley v. Harman*, 11 Ad. & El. 798.

5. A master is not liable to a servant for the negligence of a fellow servant, unless for negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency: *McAndrews v. Burns*, 39 N. J. L. 117.

6. Construction of contract giving to employe the privilege of quitting before the end of the time of his engagement: *Wilmington Coal Co. v. Lamb*, 90 Ill. 465; *Post WAGES*.

7. Measure of damages for discharge of servant before time; labor elsewhere: *Saxonia Co. v. Cook*, 7 Colo. 569.

8. A mining captain is not a fellow servant with the under-employes: *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. R. 55. *Contra* as to hoister: *Buckley v. Gould & Curry Co.*, 14 Fed. 833.

See *NEGLECTANCE*.

ARMORY V. DELAMIRIE.

(1 Strange, 505. 1 Smith's L. C. 470. King's Bench, 8 Geo. I.)

The finder of a jewel may maintain trover for conversion thereof by a wrongdoer.

¹**The master is answerable for the conversion of a customer's property intrusted to his servant in the course of his business or trade.**

²**Evidence controlled by but one party and he producing it not.** Where the evidence of the true measure of damage lies solely in the power of one party to produce and he refuses to produce it, the strongest measure of damage is to be presumed against him.

The plaintiff being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretense of weighing it, took out the stones and calling to the master to let him know it came to three half pence, the master offered the boy the money, who refused to take it and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will lie against the master, who gives a credit to his apprentice and is answerable for his neglect.

3. As to the value of the jewels; several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury, that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

¹ *Mead v. Hamond*, 9 M. R. 672.

² *Lupton v. White*, 2 M. R. 430; *Antoine Co. v. Ridge Co.*, 10 M. R. 97; *Butte Co. v. Vaughn*, 4 M. R. 552.

ATTERSOLL V. STEVENS.

(1 Taunton, 183. Common Pleas, 1808.)

¹**Lessee recovering full value against trespasser.** James Theobald² demised land to the plaintiff at an annual rent for 21 years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre *being after the same rate that the whole brick earth was sold for*. A stranger dug and took away brick earth; the lessee recovered against him the full value of it. It was *held* that he was entitled to retain the whole damages.

BEST, Sergt., had, in Michaelmas term last, obtained a rule *nisi* for setting aside the verdict which had been found upon the execution of a writ of inquiry, after judgment suffered by default in this action. The declaration was in trespass, and stated that the defendant had broke and entered the plaintiff's close and dug therein and carried away a quantity of brick earth of the plaintiff, and converted it to his own use. There was also a count for taking, carrying away and converting other brick earth of the plaintiff. The circumstances of the case, as disclosed by the affidavits, were that by indenture of lease dated the 15th of June, 1792, James Theobald had demised to the plaintiff several closes of land at Gray's, in Essex, containing 565 acres, excepting thereout the land let to James Burn, whose lease had come by assignment to the defendant, together with full power to the plaintiff to dig to or for brick earth or clay, and to make or convert the same into brick or tiles, as thereafter mentioned, to hold to the plaintiff for a term of twenty-one years, at the rent of £1,075 per annum. The lessor covenanted that the plaintiff should have, take and enjoy from and out of certain grounds containing thirty-eight and one half acres, including therein a certain field called the *brick field*, containing five and one half acres (the remaining part of which was let to James Burn and others) with free right and liberty annually to dig, turn up or sink to the depth of twenty feet from the plane surface, one half acre of the said ground, for the purpose of obtaining thereout brick earth and clay to be

¹ *Austin v. Hunstville Co.*, 9 M. R. 115; *Chamberlain v. Collinson*, 9 M. R. 36; *Stockbridge Co. v. Cone Works*, 6 M. R. 317.

made into bricks or tiles, or otherwise to be disposed of as the plaintiff should think proper; and the plaintiff covenanted not to dig more than half an acre in any one year; or in case he should dig any greater quantity, that he should pay unto the said James Theobald the increased rent of £375 for every half acre so dug, *being after the rate that the whole brick earth was thereby sold or intended to be sold.* Upon the execution of the writ of inquiry the plaintiff proved that the defendant had excavated a piece of ground of the extent of forty-eight perches, part of the $38\frac{1}{2}$ acres destined by the lease for digging brick earth, and that the clay taken from thence was of a quality for making bricks superior to the residue of the plaintiff's land; but he gave no evidence of any injury done to his possession, other than the loss of this earth. On behalf of the defendant it was represented to the jury, and the under-sheriff, that they ought not to adopt for their measure of damages the full value of the earth so taken, because the plaintiff had a mere possessory interest in the soil, and no right to the soil itself, beyond the extent of half an acre annually; that this trespass did not impede him in the exercise of his right to take his annual half acre, because the $38\frac{1}{2}$ acres were much more than enough to furnish the half acre for every year during his term; and that therefore the plaintiff was entitled to nominal damages only, inasmuch as the defendant would, after the event of this action, remain responsible for the value of the earth dug to the plaintiff's landlord, to whom it belonged. That, on the other hand, if the plaintiff were permitted to recover the full value of the earth, he would recover what did not belong to him, for that he would not be liable to his landlord for any increased rent in respect of the earth for which these damages were given, since it was not dug by himself, the lessee, but by a stranger. The jury, however, found a verdict for the plaintiff with £550 damages, which they consider to be the full value of the whole of the brick earth so dug by the defendant.

LENS, Sergt., showed cause against this rule.

BEST, Sergt., *contra*.

CHAMBRE, J.

This case comes before the court upon a motion to set aside

the execution of a writ of inquiry of damages in an action of trespass, the jury, under the direction of the under-sheriff, having assessed the damages by a rule contended not to be legally applicable to the circumstances of the case. The circumstances, as appears by the affidavits on both sides, are these: The plaintiff is a lessee for the residue of a term of twenty-one years, commencing in 1792 or 1793, of an estate consisting of several hundred acres. As to 38 acres, parcel of the farm, the lessor has covenanted that the plaintiff shall have free right annually during the term, to dig half an acre thereof to a certain depth, for the purpose of obtaining the brick earth to be made into bricks or tiles, or otherwise disposed of. And the plaintiff, (the lessee), has covenanted not to dig more than half an acre in any one year; or that if he did, he should pay an increased rent of £375 for every half acre so dug, which is mentioned to be "after the rate that the whole brick earth was thereby sold for or intended to be sold." The plaintiff being in possession under this lease, the defendant, who has a brick ground adjoining, either willfully, or by a mistake of the boundaries, dug up and converted the brick earth of a portion of the said 38 acres, parcel of the plaintiff's farm, which the plaintiff had not then particularly appropriated for the exercise of his own right; and for this trespass the action was brought, wherein judgment being suffered to go by default, the whole value of the brick earth taken, and all the damages arising from the acts of the defendant, have been assessed to the plaintiff, as fully as if he had been owner of the fee simple in the estate, without making any deduction for the interest of the landlord, or for any damages for which the defendant is liable in an action at the landlord's suit. I am of opinion that the rule given to the jury was wrong, and that the proceedings ought to be set aside.

It is necessary in the first place to see what were the legal rights of the plaintiff and of his lessor at the time when the trespass was committed; for the matter in which the defendant is liable to render satisfaction for the injury he has done, must depend on the nature of those rights at that time. The plaintiff had the possessory right for the residue of the term; besides this, the covenant of his lessor gave him a special privilege to take the brick earth of half an acre, part of the thirty-eight

acres, in each year of the term, without paying any additional rent or compensation for it to the landlord. He had also the further privilege of digging up and appropriating to his own use the brick earth of the residue of those thirty-eight acres, at any time during the term, either the whole of it or such parts as suited his interest or inclination; but upon the terms of making a large compensation to the lessor for the exercise of that further privilege. By exercising those privileges, and severing the brick earth from the soil and freehold, he becomes a purchaser of, and acquires a property in, the earth so severed, and the covenant protects him from the consequences of what would otherwise be waste; but, till then, the earth remains a part of the soil and freehold of the lessor. There are no words in the lease to convey any estate of freehold to the plaintiff; his right rests in covenant; the contract is executory, and it depends upon his own subsequent choice and acts, whether he will take, or the lessor shall part with, anything by the covenant or not. The plaintiff's interest then consists in his possessory right, and in the privileges communicated to him by the covenant. He may still take his half acre *per annum* out of the residue of the thirty-eight acres, but the act of the defendant has prevented him from exercising his further privilege to the full extent, and the main question is, how the value of that further privilege is to be estimated. It appears to me clear that his beneficial interest therein was no more than the difference between the value of the earth taken by the defendant, and the price that the plaintiff must have paid for it if he had taken it himself; all the remaining interest in the reversioner, who, as I conceive, could maintain no action against the plaintiff for the rent or compensation agreed upon by the covenant, in respect of brick earth dug up and taken, neither by or for the plaintiff, but by a stranger, against his will; and for which act, so far as it affected the inheritance, and the right which the reversioner would otherwise have had against his tenant under the covenant, the compensation, I apprehend, was due to the reversioner, and the reversioner only, and recoverable by him in an action on the case. Undoubtedly the defendant is answerable to the full extent of the injury he has done; but to whom is he answerable? Where different parties have distinct rights in

the subject of a trespass, the compensation must be to each in proportion to the injury he has received. One of them can not claim that part of the compensation which belongs to the other; nor can the satisfaction made to one be a bar to an action brought by the other. It can hardly be necessary to cite cases upon this point. I will, however, just refer to two: 19 H. 6, 4, 5, and *Biddlesford v. Onslow*, 3 Lev. 209. It has been supposed in the course of the discussion in the present case, that where there is an existing tenancy for life or years, so that an action of waste may be brought against the tenant for any injury done to the inheritance, that action is the only remedy the reversioner has, and he can maintain no action against the stranger, who in fact commits the waste; but I take the law to be clearly settled otherwise; and that the reversioner may in all cases maintain an action on the case against such stranger, whether the tenancy be at will, for years, or life; or he may, if he pleases, waive the penal action of waste, even against the tenant, and bring case against him. The only authority against this is a *dictum* of Lord Coke, in his commentary upon the statute of Marlbridge, 2 Inst. 146, "that if the lessor should not have the action of waste, he should be without remedy." But all practice is against that *dictum*; and I incline to adopt the supposition of Pemberton and Levinz, in the case of *Jefferson v. Jefferson*, 3 Lev. 130, that Lord Coke is to be understood according to the subject-matter he is speaking of; that is, that he had no remedy by an action of waste; and the rather, as Lord Coke himself has taken no notice of the position in his commentary on the 67th section of Littleton, where he treats largely on the subject of waste. There is a full, judicious statement of the law on this subject, in a note of my brother Williams upon the case of *Green v. Cole*, 2 Saund. 252 b. The manuscript precedents upon the point, settled by pleaders of the first reputation in their time, are numerous. The case of *Biddlesford v. Onslow* seems also to be an authority, though the act which occasioned the waste was not an immediate trespass upon the land, but an obstruction of a rivulet in an adjoining piece of land, by which the stream was turned upon the land and wasted it. That act the tenant had a right to withstand, by removing the obstruction as much as he had the right of resisting an actual trespass.

upon the land. The action, however, is not an action of waste against the tenant, but an action on the case against the person who diverted the stream. It is further argued, and it seems to be the argument most relied upon in support of the plaintiff's right to recover the whole, that he is liable to pay the additional rent for the ground dug up by the defendant, though it was done without his consent, and against his will, and he received no benefit from it. And therefore it is said that the lessor loses nothing, and the plaintiff, who must pay him the increased rent, has a right to stand in his place and recover the whole damages from the defendant. If this were so, it might still be doubted whether in a general action of trespass, alleging no special damage, any increase of damages could be given to the plaintiff by reason of his liability to pay money under a particular contract; but without resting on that objection, I think the foundation of the argument totally fails, being of opinion, as I have before expressed myself, that the plaintiff, in respect of what the defendant has done, is not liable to any payment under his covenant in the lease.

The case is not within the terms of the covenant. The plaintiff has not directly or indirectly done the act, or received the benefit, from whence the obligation to pay is to arise. To supply, however, the defect of the language of the covenant, recourse is had to a supposed rule in actions of waste, namely, that where the waste is committed by a stranger, it is presumed to be done by him in collusion with the tenant, and that for that reason the tenant must always be charged in the proceeding with having committed the waste himself. But I apprehend that this argument can not possibly apply in this case. In the first place, I think the law of the action of waste attaches upon no part of the transaction. The plaintiff has not been rendered liable to such an action; his lessor could not proceed against him in that action, without stating that the waste was committed by the plaintiff himself, against which charge the lease that gives him the authority, affords a complete defense. I apprehend, too, that this supposed presumption does not take place even in the action of waste itself. I find no traces of it in any of the books. The act, indeed, is considered as the act of the tenant; but the reason assigned is, that he may withstand the commission of waste, *et qui non obstat quod obstat*

potest, facere videtur. The situation of the tenant is extremely analogous to that of a common carrier ; to prevent collusion (and not on presumption of actual collusion), both are charged with the protection of the property intrusted to them, against all but the acts of God and the king's enemies ; and as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him. But supposing that collusion must necessarily be presumed in the action of waste, the presumption must stop there. If it were otherwise, the tenant would be without redress against the actual wrongdoer, by whom he has been subjected to a forfeiture and damages. There is no doubt that he has a remedy against him by action of trespass ; but if the presumption continued, the collusion established by it would amount to a license, and afford a defense to the action. It would be still more extravagant to set up the presumption again in an action of covenant, to wrest and pervert the plain meaning of unambiguous words, and especially in a covenant, one of the effects of which is, to prevent any liability to the action of waste for the species of injury which the land has received. There is no other rule, I think, to construe the covenant by, but the obvious intention of the parties, and the plain meaning of the language they have used ; and the substance of their agreement, is no more than this, that if the plaintiff, in his business of brick-making, thought fit to use the materials that were to be found in part of the farm he took in lease, he should be at liberty so to do, paying a fixed price for what he took and had the benefit of. That price he covenants to pay ; but I do not know by what law we are authorized to extend this covenant, so as to make him responsible under it for what has been taken by a stranger, by trespass, and against the plaintiff's will, and for which the plaintiff has brought an action of trespass. In what I have said upon the proper estimate of the plaintiff's damages, I have not noticed several circumstances and distinctions that might require attention in making the estimate ; for instance the subversion of the soil, from its effect upon the produce and future cultivation of the

ground during the term, was an injury to the plaintiff's interest as tenant, for which, if the case rested there, proportionate damages ought to be given him; but if he goes for the greater damage, in respect to the profits he might have made of the brick earth, he must give up the other damages, because he himself could not have obtained that greater profit, without doing the same damage to the ground with respect to the purposes of agriculture. But I have only noticed the principal object of damages, that being sufficient to dispose of the legal question before us; and upon that question my opinion is, that the plaintiff has had damages assessed to him which belonged to another person, his lessor, and therefore I think the proceedings upon the inquiry ought to be set aside.

HEATH, J., and MANSFIELD, C. J., gave concurring opinions.

Rule discharged.

MARTIN V. PORTER.

(5 Meeson & Welsby, 351. Court of Exchequer, 1839.)

¹**Working across boundary.** Where the defendant in working his coal mine broke through the barrier and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale: *Held*, in trespass for such working, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it.

Trespass for breaking and entering the plaintiff's close, situate at Darfield, in the county of York, and breaking and entering a certain coal mine, etc., under the said close, and taking and carrying away the coal, and carrying it along and through levels and ways, and taking away other coals and converting and disposing thereof to the use of the defendant.

Plea, payment into court of the sum of £133, and no damages *ultra*. Replication, damages *ultra*.

At the trial before PARKE, B., at the York spring assizes, it appeared that the plaintiff was a lessee of coal mines under the Duke of Leeds, and that the defendant was the

¹ *Barton Co. v. Cox*, 10 M. R. 157; *Blaen Aron C. Co. v. McCulloch*, 59 Md. 403; 43 Am. R. 560; *Illinois Co. v. Ogle*, 10 M. R. 198; *Morgan v. Ponce*, 10 M. R. 79.

owner of the adjoining estate. In the year 1838, in consequence of inquiries having been instituted, it was discovered that the defendant had worked the coal under the plaintiff's land, to an extent exceeding a rood. The defendant, by paying money into court, admitted the trespass; and the only question at the trial was, upon what principle the damages were to be assessed, the plaintiff contending that he had a right to hold the defendant liable for the value of the coal when gotten, and when first it existed as a chattel, without any deduction for the expense of getting it; that he ought also to pay for the underground way-leave, having carried coals from his own colliery through the plaintiff's bed of coal. The learned judge was of opinion that the plaintiff would have been entitled in an action of trover to the value of the coal as chattel, either at the pit's mouth, or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; that, not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth; and that he was also entitled to compensation for the defendant's passing through his coal, with coals gotten from his own mines, and ought to pay as for a way-leave, which, in the neighborhood of Leeds, was proved to be 2*d.* per ton. The jury adopted the above principle, and found the value of the coals when got to be £251 9*s.* 6*d.*, and they also gave £50 for the use of the way-leave, making together £301 9*s.* 6*d.* The learned judge gave the defendant leave to move to reduce the damages to £16, if this court should be of opinion that the proper measure of damage was the value of the coal in the bed, which the jury estimated at £149.

ALEXANDER, in Easter term, moved accordingly. The damages ought to be estimated by the average value of the coal as lying undisturbed within its native bed. The plaintiff had incurred no expense or risk in the necessary preparations for its working. As far as he was concerned, it might still have lain undisturbed, and probably would have done so, as the

evidence showed that the expense to him of working out so small and detached a bed of coal as the one in question (altogether containing little more than two acres, and a half) would be double its salable price. Had he contracted to sell it ungotten, the average price of coal per acre in that neighborhood being (as proved) only £300, the price for the coal in question would have been much below the sum paid into court. To allow of any other estimate of damages, would be to confer on the plaintiff a large profit, in the absence of any thing either done or suffered by him upon the occasion. That he should not lose anything by the unauthorized act of the defendant is just; and the proposed reduction of the damages would be consistent with that view. But if he retain the amount given, on the principle laid down by the learned judge at the trial, he is paid not merely the value of his coal, but a doubled value, to which he has in no respect, by any acts of his own, entitled himself, and which can not be created by any tortious act of another. Whether the defendant approached the coals without or with the sanction of the plaintiff, can not alter their intrinsic worth; and what that worth was when the defendant commenced his workings, ought to be the proper test of this part of the damages. It must not be forgotten, that the sum claimed by the plaintiff, as the additional price of the coals, is precisely the amount actually paid by the defendant himself to the workmen before the coals were brought from their original situation to the bottom of the pit; and which must equally have been paid by the plaintiff, had he been working with the same object.

LORD ABINGER, C. B.—I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How then can he now claim to deduct it? He can not set up his own wrongs. The plaintiff had a right to treat these coals as a chattel to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail.

PARKE, B.—I remain of the same opinion as I entertained at the trial. The plaintiff is entitled to be placed in the same

situation as if these coals had been chattels belonging to him self, which had been carried away by the defendant, and must be paid their value at the time they were begun to be taken away. He had a right to them, without being subject to the expense of getting them, which was a wrongful act by the defendant, and for which the defendant can not claim to be reimbursed. I am not sorry this rule is adopted, as it will tend to prevent trespasses of this kind, which are generally willful.

ALDERSON, B.—I am of opinion that the plaintiff is entitled to damages as for a trespass to his goods, the same as he would to any other description of goods belonging to him. The proper estimate is the value of them when gotten, and when the defendant took them away.

MAULE, B.—I concur with the rest of the court, and think the plaintiff had his claims assessed in a manner which he was entitled to.

Rule refused.

WOOD V. MOREWOOD.

(3 Q. B. 440, *Note*. Derby Summer Assizes, 1841.)

¹ **Damages where trespass is done under claim of right.** Where there is fraud or negligence on the part of the defendant, the jury may give the value of the coals at the time they first became chattels; but where taken without fraud or negligence in the belief that he had a right to take them, they should give only the value of the coal in place.

This was an action by the plaintiff for an injury to his reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals. There were pleas of leave and license, and that the defendant was seized as of freehold in the mines of coal, on which issue was joined. The defendant claimed under Sir John Zouch, who was seized of the closes, with others, and the beds of coal under the same (*Temp. Eliz.*), and conveyed all the coals belonging to him to

¹ *Waters v. Sterenson*, 10 M. R. 240; *Jegon v. Vivian*, 8 M. R. 628; *Austin v. Huntsville Co.*, 9 M. R. 115.

one under whom the defendant proved his title. The plaintiff, claimed the closes in question by a prior conveyance of them without the exception of coals, from Zouch. The defendant has won the coals under the closes, *bona fide* supposing that these were his under his title from Zouch. Whether they passed or not depended upon the question whether an ancient settlement by another Zouch (Temp. Eliz.), which existed at the time of the conveyance of the plaintiff's closes for value, was voluntary or not. There was also some evidence of license as to part. The plaintiff claimed damages on the principle laid down in the case of *Martin v. Porter*, 5 M. & W. 351, which amounted to about £10,000 or £11,000.

SIR W. W. FOLLETT, for the defendant, contended that the jury were the proper judges of damages, and that, in this case, where there was no imputation of fraud or want of reasonable care and caution on the part of the defendant, they might assess the damages on the principle that the defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was to be at the expense of getting it.

PARKE, B., told the jury that, if they found for the plaintiff, they were to determine what damages should be given; that, if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal fields had been purchased from the plaintiff.

The jury adopted the latter estimate, and found for the plaintiff, damages £210 per acre—£2,310. No motion for a new trial was made.

MORGAN V. POWELL.

(3 Queen's Bench, 278. 1842.)

¹ **Value of the coal when first severed.** In trespass for digging plaintiff's coals in his mine, and taking and converting them, the proper measure of damages is the value of the coal when it was first severed from the mine; if defendant has afterward removed the coal and brought it to the pit's mouth, plaintiff can not recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed.

Defendant allowed cost of hoisting. The defendant, in trespass, must be allowed in damages for his expense and labor in removing the coal and bringing it to the pit's mouth, but not in first severing it from the mine.

Trespass for breaking and entering plaintiff's coal mine and strata and digging and getting plaintiff's coal, to wit, 20,000 tons, etc., out of the said mine and strata; also for digging and making levels in certain strata, etc., of plaintiff, and carrying away and converting the materials, to wit, 10,000 cart loads of coal; and for carrying coals with horses, trams, etc., through the said levels; and by the several means aforesaid damaging the strata, etc., and causing loss of plaintiff's coal, etc. Judgment by default.

An inquiry of damages was executed before COLERIDGE, J., at the Monmouthshire Spring Assizes, 1841, when it appeared that the plaintiff and defendant were proprietors of adjoining coal mines, the defendant holding two, and the plaintiff a third, partly situate between them. The defendant had, from one of his own mines, entered that of the plaintiff, and had there worked coal belonging to the plaintiff, carried it away and brought it up to the mouth of his own pit, and had also carried coal from one of his own mines (held under Lord Dynevor) through the workings so made in the plaintiff's mine. Compensation was claimed: 1. For the value of plaintiff's coal worked and taken away by defendant. 2. For the injury which plaintiff's unworked coal had sustained by the mode in which defendant had made the headings or workings. 3. In respect of the coal from Lord Dynevor's mine which defendant had conveyed through the workings of plaintiff's

¹ See note, 10 M. R. 74.

mine. On the last two heads damages were assessed, as to which no subsequent question arose. On the first, the plaintiff demanded compensation at the rate per ton which a purchaser would pay for coal at the pit's mouth, which was proved to be 5*s.* 8*d.* For the defendant it was urged that he ought not to pay more than the value of the coal after deducting the expenses of cutting and bringing it to the pit's mouth, which were estimated at 3*s.* 10*d.* per ton: *Martin v. Porter*, 5 M. & W. 351, was cited for the plaintiff; and the learned judge, considering himself bound by the decision as stated, though he expressed a doubt of its correctness, advised the jury to give their verdict on the principle of the plaintiff's estimate, but reserved leave to move to reduce the damages by the difference between the values at the pit's mouth and in the ground. The jury found their verdict as directed; damages on this head of claim, £1,400.

SIR J. CAMPBELL, attorney-general, in Easter term, 1841, obtained a rule to show cause why the verdict should not be reduced "by the amount of the expense of getting the coals and bringing them to the pit's mouth." Cause was shown in Easter term, 1842.

LUDLOW, Sergt., for the plaintiff, cited *Martin v. Porter*, 5 M. & W. 351. The court then called upon the other side.

SIR W. W. FOLLETT, solicitor-general, TALFOURD, Sergt., and KEATING, in support of the rule.—This is an action of trespass for taking away the plaintiff's coal. In such an action he is entitled to recover the value which the coal had when it first became a chattel, that is, when it was first severed from the soil. The labor afterward bestowed in bringing it to the pit's mouth gave it an additional value, but that can not be brought into account by the plaintiff in the present action. This must be the effect of the decision, rightly understood, in *Martin v. Porter*, 5 M. & W. 351. (LORD DENMAN, C. J.—If a trespasser make himself owner of the coal by digging it out, and then does something more to it, which increases the

¹ By a shorthand writer's note his lordship appears to have said: "But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been to put him in the same position as he would have been, if the coal had never been stirred."

value, must he not bear the loss of such added value when the true owner recovers his property?) It would be hard to say where that doctrine would stop. If correct, it might apply when the coals had been carried to Newport or London, or if ore had been taken and manufactured. It would introduce a new estimate of damages in an action for mesne profits; if valuable crops had been raised during the wrongful occupation, the defendant could claim no allowance for culture. (COLERIDGE, J.—There an entirely new thing would have been produced. PATTESON, J.—Mesne profits for past years are estimated according to a fair rent, but, if a party is ejected while crops are in the ground, he gets nothing for them.) If the plaintiff had brought trover or detinue for the coal after it was brought to the pit's mouth, he might have recovered the full value which it had then acquired, without deduction, or the coal itself as improved in value; but the taking and converting for which this action is brought, consists in detaching the mineral from the freehold, and must be referred to the moment when that was done. (LUDLOW, Sergt.—The plaintiff may claim his damages for the coal as accruing at the first moment when he could take it; and that was when it reached the pit's mouth. He could not enter the pit to take it.) That does not alter the nature of the claim in this action. If the plaintiff was put to any expense in obtaining the coal after the first severance, which he would not otherwise have incurred, that damage might be the subject of a distinct claim, but can not be assessed here. (COLERIDGE, J.—In an action of trover the plaintiff might have recovered the goods, without deduction for the additional value, at the first moment when he was able to take them.) That is a very different kind of action. The damage here lies in what was done at the time of severance from the mine itself, and the plaintiff must recover according to the value there and not elsewhere. This is precisely the opinion expressed by PARKE, B., at *Nisi Prius*. in *Martin v. Porter*, 5 M. & W. 352. The present case bears some analogy to *Jones v. Gooday*, 8 M. & W. 146. There a commissioner of paving had cut away part of the plaintiff's land in widening a ditch; the plaintiff claimed to recover in trespass such a sum as would restore the land to its former condition; but the Court of Exchequer held that he could demand

only so much as would compensate for the damage actually sustained. Here the plaintiff claims, not only that which would indemnify him for the damage complained of in this action, but a large additional value created by the defendant's labor, and for which he furnishes no equivalent) (LUDLOW, Sergt., mentioned *Wild v. Holt*, 9 M. & W. 672, not then reported.) That case and *Martin v. Porter*, 5 M. & W. 351, if they have the effect contended for, go too far. The argument drawn from them would show that, if a man had taken another's timber, and made it into a piece of furniture, the loser might claim the article of furniture or its value. (LORD DENMAN, C. J.—It might be answered that the timber had become a different thing, but if a trespasser carries away my tree,* and I follow and retake it, can he make a charge for his labor? COLERIDGE, J.—In trover could a defendant set up a lien for the labor he had bestowed? LORD DENMAN, C. J.—The new value given by the wrongdoer might be less than the article would perhaps have had if left. The coal owner, in this case, might have deferred raising his coal till there was a better market.)

LUDLOW, Sergt. and R. V. RICHARDS, were then called upon to show cause. The argument from the increased value given by the trespasser's labor is answered by the passage in 2 Blackstone's Commentaries, 404, b. 2 c. 26, which lays down the doctrine adopted by our courts from the civil law, as to "property arising from accession." And the rule, as applied here, is not unjust. The labor is bestowed upon the chattel without the owner's consent. He might wish to keep the tree in its first state or to reserve his coal for the chance of a better market. When the tree has been wrongfully cut down and removed, the owner may follow and retake it at the first opportunity. Can it be said, when he claims to do so, that he shall not have his tree back without paying for the trimming, carriage, and turnpikes? Here, a trespass was committed by severing the coal in the mine; the owner could not retake it there; by a continued trespass it was brought through the defendant's lands, to the pit's mouth; and there, first, the owner was enabled to take it. Suppose at that earliest opportunity he had actually repossessed himself of the chattel; could the trespasser then have sued him for work and labor

done upon the chattel since the first severance? Or could he have claimed a lien? If the claim of reduction here be well founded, he might. *Jones v. Gooday*, 8 M. & W. 146, has no bearing on this case. The decision of the Court of Exchequer last term, in *Wild v. Holt*, 9 M. & W. 672, supports and goes beyond that in *Martin v. Porter*, 5 M. & W. 351.

Cur. adv. vult.

LORD DENMAN, C. J., in this term (June 9th,) delivered the judgment of the court.

This was an action for breaking a mine, digging coal, carrying it unlawfully along the plaintiff's adit, and taking and converting it to the defendant's use. Judgment was suffered by default, and a writ of inquiry executed before my brother Coleridge.

The question was, how the value of the coal taken was to be estimated; and the learned judge directed the jury to act on the rule laid down in *Martin v. Porter*, 5 M. & W. 351. The rule, however, was misstated at the trial, and the calculation has been accordingly taken without making certain allowances which that rule provides for. The direction of the learned judge in that case was, that the plaintiff was entitled to the value of the coal as a chattel, "at the time when the defendant began to take it away, that is (as there stated), as soon as it existed as a chattel, which value would be the sale price at the pit's mouth after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth, and this direction the Court of Exchequer has affirmed. In the present case the rule was taken to be absolute, and without the deduction.

We are of opinion that the rule in *Martin v. Porter* is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit, and the estimate of that loss depends on the value of the coal when severed—that

is, the price at which the plaintiff could have sold it. This plainly was the value of the coal itself at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article without being taken from the pit; any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be supposed where particular circumstances would vary this mode of calculating the damage; but none such appear here. We do not find that the cost incurred by the defendant in bringing the coal to the pit's mouth is greater by a single farthing than that which the plaintiff must have incurred for the same purpose.

The damages found by the verdict must therefore be reduced by the amount of this charge, which may be ascertained by reference to the judge's note, or there must be a new execution of the writ.

Rule absolute for reduction as above.

UNITED STATES v. MAGOON.

(3 McLean, 171. Circuit Court, U. S., 1843.)

Trespass for digging lead ore on U. S. land. In trespass for digging and carrying away lead ore from lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug. The injury done the soil is the gist of the action; and ore extracted must be considered in aggravation of the damages.

¹ **The rental value of the land** is not a proper measure of damages in the case of trespass for taking ore.

BUTTERFIELD, district attorney, appeared for the plaintiffs.

LOGAN, for the defendants.

McLEAN, J.

This is an action of trespass, charging the defendant with

¹ *Huston v. Wickersham*, 2 Watts & S. 314; compare *Allen v. Barkley*, 1 Sp. Eq. 264; *Post TEN. COM.*

digging and carrying away a large amount of lead from the lands of the United States.

The defendant suffered a default, and the jury was sworn to assess the damages, etc.

It was proved that defendant entered upon the lands of the United States, dug a large quantity of ore, and conveyed it away.

The plaintiffs contended that they are entitled to the value of the ore, after it was dug; but the court instructed the jury that that was not the measure of damages, but the injury done to the soil by the trespass. That the digging and carrying away by the same person, is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil.

Neither is the rate at which leases are made for these mineral lands a proper criterion of damages. A trespasser is not to be put upon the footing of a lessee.

The jury assessed the damages at———dollars. Judgment.

LYON V. MILLER.

(24 Pennsylvania State, 392. Supreme Court, 1855.)

Lease—Parol evidence to qualify working covenant. In *covenant* upon a lease under seal, it was inadmissible to prove that when the lease was preparing, the quantity of coal to be mined under the lease was omitted at the request of the defendant, and that "he then undertook and promised to mine as much as he could dispose of."

Waiver of exceptions. When an amended declaration is withdrawn, a bill of exceptions to evidence offered under it falls with it.

¹ **Lessee mining beyond bounds.** Under a lease authorizing the defendant to mine coal on land *south* of a designated line, the lessors in covenant on the lease, were not entitled to recover for coal mined *north* of the said line; and that the plaintiffs were in possession of the land north of the said line was not material. For coal mined *north* of the line the defendant may be liable *in trespass*.

Royalty recovered on coal not dug. The plaintiffs leased to the defendant the right to mine coal on their land *south* of a disputed line, at a royalty of so much per bushel. The plaintiffs were permitted to recover not only for the coal actually mined, but for what the defendant rea-

¹ *Freck v. Locust Co.*, 9 M. R. 57; *Sheldon v. Davey*, 8 M. R. 581.

sonably could and should have mined upon the land leased; but for the quantity not mined, the measure of damages was the difference between the stipulated rate of compensation and the value of the coal left unmined.

Error to the Common Pleas of Blair County.

This was an action of covenant by George Mulhollan and William Lyon *v.* John Miller, founded on an agreement under seal or lease by the plaintiffs to Miller, dated 30th March 1848. By the instrument referred to, the plaintiffs leased to Miller the privilege and right to mine and dig coal on their land *south* of a line of land in dispute between them and Shoenberger. Miller was to pay "for every bushel he may mine or dig upon said land" three eighths of a cent. The lease to terminate on 1st April, 1849.

Mulhollan died, and the administrator of his estate was substituted.

On the trial, the plaintiffs' counsel offered to prove that at the time of entering into the agreement, upon one of the plaintiffs desiring to specify in it the number of bushels of coal to be dug by Miller, the defendant declared that he would prefer that no stipulation as to the quantity to be taken out should be introduced, as it was his interest to mine as much as he could dispose of; and that he then "undertook and promised to mine as much as he could dispose of."

The evidence was overruled, and exception taken. First bill.

An amended *narr.* was filed, in which an undertaking to that effect was alleged, and the evidence was again offered and rejected. Second bill.

On part of *defendant* it was offered to show that most of the coal mined by the defendant was mined *north* of the line designated in the lease, and on *the land of Shoenberger*.

This was objected to on part of the plaintiffs on the ground that Miller, having accepted the lease, was estopped from proving that coal mined by him was taken from any other land than that of the plaintiffs. The objection was overruled. Third bill.

Nothing was testified as to the title to the land north of the disputed line.

On part of the *plaintiffs* it was offered to show that they were in possession of the land outside of the line mentioned in the lease, not because they claimed for coal taken outside of that line, but in order to rebut *any equity* in the defendant. It was overruled, and exception was taken. Fourth bill.

TAYLOR, P. J., charged, *inter alia*, that the plaintiffs, in addition to compensation for the coal mined under the lease, were also entitled to recover "for what the defendant reasonably could and should have mined upon the land leased," and that it was clear that he could have mined upon the plaintiff's land *south* of the disputed line the whole of the 368,000 bushels which he did mine. It was, however, referred to the jury to determine the quantity which he could reasonably have mined.

As to the measure of damages for the coal not mined, but which should have been mined, he charged that it was not the rate stipulated in the lease, as the coal was still in the land; but such less sum as would justly compensate the plaintiffs for the failure of the defendant to mine to the extent he had contracted to mine.

Verdict for plaintiff for \$276.

Error was assigned to the rejection and reception of the evidence referred to in the bills of exceptions; and, fourth, to the instruction as to the measure of damages.

HOFIUS, for plaintiff in error.

BANKS and MILES were not heard in reply.

The opinion of the court was delivered by LEWIS, C. J.

As the second amended declaration was withdrawn by the plaintiffs in error, their bill of exception to the rejection of evidence offered under it is not a matter for consideration here. The parol evidence of an agreement, different from the covenant declared on, was properly rejected. This disposes of the first assignment of error.

This action is founded on an agreement under seal, by which Mulhollan and Lyon granted to John Miller the right to mine and dig coal on their land, *south* of the line known as the dis-

puted line, he paying for every bushel of coal he may mine or dig upon the land, three eighths of a cent. As the contract only authorized the defendant to dig coal *south* of the line designated, and the action was founded on that contract, it seems clear that the plaintiffs could not, in this action, recover for any coal taken out *north* of the line. If he took coal from other land of the plaintiffs, without authority, he might be liable in trespass, but he is not answerable for it in this form of action. It was therefore a good defense *pro tanto* to show that part of the coal for which the plaintiffs claimed compensation under their lease was not taken from the demised premises. It was no answer to this defense to show that the plaintiffs were in possession of the land *north* of the line. Such evidence could have no tendency to rebut an "equity of the defendant." His defense was not founded on an equity. It stood upon a perfectly legal right to confine the claim for rent to the premises demised. The second and third assignments of error are therefore unsustained.

Under the charge the plaintiffs were permitted to recover not only for the coal actually mined, but for what defendant "reasonably could and should have mined upon the land." For the coal actually mined the contract had fixed the measure of compensation; but for that which ought to have been mined, but was not, the court instructed the jury that the plaintiffs "were not entitled to the stipulated rate" because "they still had the coal in the mine." The coal in the mine was certainly worth something. As matter of law the court was bound to consider it as possessing some value. It was therefore proper to direct the jury to ascertain the value, and to deduct it from the stipulated rate. On this part of the plaintiffs' claim, the measure of damages is the difference between the stipulated rate of compensation, and the value of the coal in the mine. In adopting this rule the court below followed the decision recently made by this court.

Judgment affirmed.

PELL, ASSIGNEE OF COUCH, V. SHEARMAN ET AL.

(10 Exchequer, 766. Exchequer of Pleas, 1855.)

¹ Lessee surrendering lease to third parties to sink for coal, who fail to dig for same. Defendants covenanted with the plaintiff, that if he would surrender to his lessor a certain lease, they would within two years, or within such period as should be fixed by a new lease which the lessor had agreed to grant them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, and in case a workable vein should be reached, to pay to plaintiff £2,500. The plaintiff having sued defendants for a breach of this covenant, gave evidence to show that if the defendants had sunk the pit they would have found the coal. *Held*, that plaintiff was entitled to more than nominal damages, and that the true measure of damages was the amount which he had lost by being deprived of the opportunity of finding marketable coal.

Covenant. The declaration stated that before the estate and effects of Couch became vested in the plaintiff as such assignee, the defendants covenanted by deed with Couch, that if he should, with the concurrence of J. Nunn, surrender to Sir C. Morgan, the residue of a term of 31 years, granted by an indenture of lease of the 20th of February, 1846, then and in such case the defendants, or some or one of them would, within two years, to be computed from the 20th of September, 1847, or within such period of time as should be agreed in a new lease, which the said deed stated that Sir C. Morgan had agreed to grant to the defendants, sink in and upon the farms, lands, hereditaments and premises which should be described or referred to in the said new lease, a pit or pits to the lower veins of coal, or to the depth of one hundred and thirty yards from the level of the Taff Vale railway at the Ddaranddu tip, in the search of the same; and also should and would, in case by the sinking of such pit or pits to such lower veins or depths as aforesaid, a marketable vein of coal, capable of being worked under the terms and conditions of the aforesaid new lease should be reached, well and truly pay or cause to be paid to the said Couch the sums of £250 and £2,000 with interest for the latter sum, and without any

¹ Compare *Chamberlain v. Parker*, 10 M. R. 144; *Kidmore v. Eikenberry*, 53 Iowa, 621.

deduction or abatement whatsoever out of the same sums and interest (that is to say,) the sum of £250 immediately after such marketable vein should have been so reached as aforesaid, and the sum of £2,000 at the expiration of twelve calendar months, after such marketable vein of coal should have been so reached as aforesaid, with interest for the same sum of £2,000 after the rate of £4 for every £100 computed from the day on which such marketable vein should have been so reached as aforesaid. Averments—that Couch and the plaintiff have done all things necessary to entitle them to have such pit or pits sunk; and all things necessary in that behalf have happened and all necessary times in that behalf have elapsed, and such new lease was granted; and that the period of time agreed in the new lease for sinking such pit or pits was four years, to be computed from the 29th of September, 1847, which period expires before the vesting of such estate and effects, as aforesaid. Breach, that the defendants did not sink in or upon the said farms, lands, hereditaments, and premises described or referred to in the said new lease so granted, as aforesaid, a pit or pits, to such lower veins of coal, as aforesaid, or to the depth of one hundred and thirty yards, from the level of the Taff Vale railway at the Ddaranddu tip, in search of the same; by reason whereof the chance of finding such marketable vein of coal, as in the said deed mentioned, and the plaintiff's chance of being entitled to the said sums of £250 and £2,000 on the finding of such marketable vein was wholly lost, and the defendants have not paid those sums, either to Couch or the plaintiff.

At the trial before MAULE J., at the last Northampton Summer Assizes, it was proved that the defendants had entered into the covenant set out in the declaration, and had failed to sink a pit in pursuance of it. The plaintiff called as witness a mineral surveyor, who stated that he was acquainted with the neighboring collieries, and that, in his opinion, a marketable vein of coal might have been found by sinking a pit to the depth of one hundred and thirty yards. It appeared that the cost of sinking such a pit would be about £2,600. There was annexed to the covenant a proviso, that if the defendants, in pursuance of the covenant, sunk a pit to the depth of one hundred and thirty yards, and did not there reach a marketable vein of coal, then if they thought fit to continue the pit

to a lower depth, Couch would pay them one fourth of the expense of such further sinking.

Under these circumstances it was submitted on behalf of the defendants, that the plaintiff was entitled to nominal damages only. The learned judge told the jury that the plaintiff had a right to have a pit sunk to the depth of one hundred and thirty yards at the cost of the defendants, and that if they had done so they would have expended £2,600, even though they found no coal; and that if they reached a marketable vein of coal, they would have been liable to pay to the plaintiff £2,500; and therefore, as they had failed to perform a work which the plaintiff had a right to have done at their cost, and which might have produced him £2,500, the jury ought either to estimate the damages with reference to the cost of sinking the pit or give the amount which might become payable under the covenant in the contingency therein mentioned. The jury assessed the damages at £2,500, and leave was reserved to the defendants to move to reduce the damages to a nominal amount.

MELLOR, in the following term, obtained a rule *nisi* accordingly, and also for a new trial, on the ground that the learned judge had misdirected the jury, and that he ought to have left it to them to estimate the value of the contingency.

MACAULAY and FIELD now showed cause.—The plaintiff is entitled to substantial damages, and the jury were properly directed as to the mode of assessing them. As a general principle, the contract furnishes the measure of damages. If a person undertakes to perform a certain work, he is bound to do it, or pay as damages what it would cost.

(PARKE, B.—In this case, there is difficulty in making the cost of sinking the pit the measure of damage, because the plaintiff can not go upon the land and make the pit. If he had been the owner of the soil, the criterion of damage would have been the expense of putting him in the same situation as if the defendants had performed their contract; and then he would only have had to spend the money in sinking the pit.) In the ordinary case of non-delivery of goods, the party to whom they ought to have been delivered has a right to purchase similar goods and recover as damages the difference between the contract price and the market price at the time of the breach of the contract. Here, the only mode

of compensating the plaintiff is either to give him the amount which the defendants must have expended if they had performed their contract, or the sum which he would have obtained if marketable coal had been got. (POLLOCK, C. B.—It certainly is not a case for nominal damages.) If the jury had computed the damages on a different principle, they would have acted contrary to the evidence, which showed the marketable coal might have been found if the defendants had performed their contract.

The court then called on MELLOR, HAYES and BREWER to support the rule.—The learned judge ought to have left it to the jury to estimate the defendants' chance of getting merchantable coal. Though the pit was sunk 130 yards, merchantable coal might not have been found at that depth; and if it was not, there was another contingency which would reduce the amount which the plaintiff might ultimately be entitled to, viz.: that the defendants had the option of sinking the pit deeper and charging the plaintiff with one fourth of the expense. Therefore, in the one event, the plaintiff would be entitled to nothing, and in the other, to a less sum than £2,500. The plaintiff can only claim compensation for the damage which he has actually sustained, and that is merely nominal. In trespass for cutting into the plaintiff's close and carrying away the soil, the measure of damage is the value to the plaintiff of the land removed, and not the expense of restoring it to its original condition: *Jones v. Gooday*, 8 M. & W. 146. Here the sinking of the pit might have been of no value whatever to the plaintiff. (PARKE, B.—There was evidence that merchantable coal might have been got; and if the jury believed that, the measure of damages is what the plaintiff has lost by the defendants' not getting it.)

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. There was evidence on the part of the plaintiff, that if the pit had been sunk, marketable coal would have been found, and no witness was called by the defendants to contradict the plaintiff's evidence; therefore we ought not to grant a new trial. I am, however, by no means prepared to say that the direction of the learned judge was wrong. The plaintiff is certainly entitled to recover more than nominal damages; and whether they are estimated with reference to the cost of

sinking the pit or the amount which the plaintiff would have been entitled to if marketable coal had been found, it seems to me that the sum which the jury have given is correct.

PARKE, B.—I am also of opinion that the rule ought to be discharged. If the defendants had sunk a pit to the depth of 130 yards, in all probability marketable coal would have been found, in which case the plaintiff would have been entitled to £2,250, and therefore, in my opinion, the amount of damages is correct. I am inclined to think that the expense of sinking the pit is a wrong criterion of damage, because the plaintiff could not go upon the land to make it. But at all events this is a case of more than nominal damages; and as the defendants have been instrumental in preventing the discovery of marketable coal, they ought to pay the plaintiff such an amount as he has lost by their neglect to perform their covenant.

ALDERSON, B.—I am of the same opinion. The plaintiff has lost the advantage of having a pit sunk to the depth of 130 yards at the cost of the defendants; and he has also lost a chance amounting to a certainty of finding marketable coal; he is therefore entitled to recover either the amount which the defendants would have expended in sinking the pit, or the amount which would have become payable if marketable coal had been found. That was a question for the jury, and I think that the finding is quite right.

MARTIN, B.—It seems to me that the summing up of the learned judge was correct. The plaintiff ought to recover what he has lost by the defendants' breach of contract.

Rule discharged.

DECOSTA V. THE MASSACHUSETTS FLAT WATER AND MINING COMPANY

(17 California, 613. Supreme Court, 1861.)

¹ **Digging ditch across another's land.** In an action against defendant for digging a ditch across plaintiff's land, praying damages, and also to have the ditch declared a nuisance, and abated: *Held*, that the plaintiff could not recover beyond the injury sustained; that as the cost of filling

¹ *Harvey v. Sides Co.*, 10 M. R. 107.

up the ditch might exceed the injury resulting from leaving it open, such cost of filling was not a proper measure of damages.

¹ **Prospective damages** can not be obtained unless it appear that the party will be subjected to the specific loss for which he demands compensation.

Modification of judgment on appeal. Plaintiff, holding a judgment for money damages, awarded upon untenable grounds, together with decree for specific relief, allowed to remit the damages; and, thus modified, the judgment was permitted to stand.

Appeal from the Eleventh District.

Suit to abate a nuisance and for damages. The complaint avers, in substance, that plaintiff is owner and in possession of a tract of about one hundred acres of land, inclosed by a ditch fence; that the land has been used for agricultural purposes for several years last past; that defendants have wrongfully entered upon said land and constructed a ditch across it, which, with its embankments, or the earth excavated, covered a space two hundred rods long and twelve feet wide, rendering so much of his land useless; that the ditch so meanders as to render it difficult and almost impossible to plow the land along the ditch; that as the ditch extends entirely across the ranch, many bridges are made necessary, etc., and that plaintiff has been damaged in the sum of two hundred and fifty dollars.

Prayer for a "decree against said defendant, adjudging said ditch to be a nuisance, and directing the same to be filled up and abated, and that plaintiff have judgment for two hundred and fifty dollars damages," and for all other and further relief.

The answer denied all these allegations, except as to the actual digging of the ditch, and averred plaintiff's consent to the digging of the ditch, defendant to pay for growing crops and repairing fences; that it was an advantage to plaintiff, and that defendant—a mining corporation—had a right to dig it for mining purposes.

On the trial plaintiff offered a witness (Berry) as to damages, and asked him what it would cost to fill up the ditch as it was before.

Defendant objected to the question as irrelevant, and not a proper basis for damages. Objection overruled, defendant ex-

¹ *Bridges v. Lankam*, 14 Neb. 369; 45 Am. R. 121.

cepting. On cross-examination, defendant offered to show that the ditch was a benefit to the ranch. Objected to by plaintiff and ruled out.

The statement in the record as to a license to defendant to dig the ditch is as follows:

"Defendant attempted to show a parol license from the plaintiff to permit defendant to construct a ditch through his inclosure by proving admissions made by him in casual conversation, but no express contract was shown, nor was there any proof to show the terms of defendant's pretended license.

"The substance of the testimony, as to plaintiff's admissions in regard to the license, was as follows, to wit: That some member or agent of the corporation had on some occasion spoken to the plaintiff about running a ditch through his inclosure, and asked him if he had any objection. In reply, plaintiff asked him where the ditch would pass through his inclosure, and thereupon a particular point was pointed out to him at which the ditch would enter plaintiff's inclosure, and the plaintiff said he might not object to the ditch provided he was paid for the damages or right of way, but mentioned no sum which he would take, nor was he offered any sum; nor was there any agreement or understanding whatever as to what sum the plaintiff would accept or the defendant give."

Verdict for plaintiff for \$225 damages. Decree for that sum, and also that the ditch "be, and the same is hereby declared to be a nuisance and ordered filled up." Defendant appeals.

H. O. & W. H. BEATTY, for appellant.

S. W. SANDERSON, for respondent.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

This is an action to abate a nuisance, and for damages. The nuisance was caused by the digging of a ditch upon the land of the plaintiff. The court ordered the nuisance to be abated, and awarded as damages a sum sufficient to pay the expense of filling up the ditch, and restoring the land to its original con-

dition. In assessing the damages, the court proceeded upon an incorrect basis, and, of course, arrived at an erroneous result. The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never be incurred. It is possible that the cost of filling up the ditch may far exceed any injury resulting from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose. There are, undoubtedly, cases in which it is proper to allow prospective damages, but it is certain that the present case does not belong to that class. "If the case be tort," says Sedgwick, "and the wrong done before suit brought, the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage, which can then be estimated as reasonably certain to occur." Sedg. on Dam. 109. It is evident that relief of this character can not be obtained, unless it appear that the party will be subjected to the particular loss or injury for which he demands compensation.

The defendants failed to make out a defense under their plea of a parol license. The evidence upon that point was wholly insufficient, and our conclusion from it is, that no such license was in fact ever given. There is nothing in the record making it necessary to examine the questions upon that subject, so elaborately argued in the briefs of counsel.

The only error is that to which we have referred; and to avoid a reversal on that ground, the plaintiff offers to remit the damages. This he has the right to do, and the judgment will therefore be modified in accordance with that offer. Thus modified, it will be permitted to stand, but the plaintiff must pay the costs of the appeal.

Ordered accordingly.

THE ANTOINE COMPANY V. THE RIDGE COMPANY.

(23 California, 219. Supreme Court, 1863.)

Verdict not disturbed when evidence conflicting. When a motion for a new trial has been overruled by the court below, the presumption is that the opinions of the judge and jury harmonize in support of the verdict, and when in such a case the evidence is conflicting the Supreme Court would not be justified in setting the verdict aside.

¹ Defendant trespassers refusing to disclose the amount taken. If, in an action for damages for taking gold from a mining claim, the plaintiffs have not, and the defendants have, the means in their power of showing the correct amount of gold taken out, the latter are themselves to blame if the jury return too large a verdict of damages.

Title by parol will support action for possession. Proof by plaintiffs of their better right to the possession of a mining claim is sufficient to sustain an action to recover possession and damages for working the same. It is not necessary to prove a transfer of title by written conveyance; a parol transfer with delivery of possession is sufficient.

Statute authorizing insertion of costs in judgment. The legislature of California in 1861 amended Sec. 511, thereby authorizing the clerk to insert the amount of the costs within two days after they shall have been taxed or ascertained in a blank left for that purpose in the record.

Appeal from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the court.

E. D. WHEELER, for appellant.

HENRY K. MITCHELL, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover the possession of certain mining ground and damages caused by the working of the same. The plaintiffs recovered judgment for the possession of the property, for damages in the sum of \$2,500, and costs amounting to \$2,952.75. The defendants moved for a new trial, and to retax the bill of costs, which were denied, and they thereupon took this appeal.

¹ *Armory v. Delamirie*, 10 M. R. 66.
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The parties are the owners of certain mining claims on opposite sides of a ridge or hill; and the main question in controversy was, how far back upon the ridge or hill their respective claims extended. The first two points of error assigned by the appellants are, that the evidence as to the location of the claims does not sustain the verdict of the jury. The third point is, that the evidence does not show that the defendants trespassed upon the ground, even as claimed by the plaintiffs. The fourth point is, that the damages are excessive, and the verdict in this respect is not sustained by the evidence. The transcript in this case is very voluminous, containing five hundred and forty-seven pages, the greater part of which is made up of the evidence given on the trial, which it seems occupied about twenty days of the time of the court below. The evidence, as is usual in such cases, is very conflicting—especially upon the principal questions involved in the controversy. It is not claimed that the court below erred in its instructions to the jury, or that any error of law occurred during the trial prejudicial to the defendants. Even if we should come to the conclusion, from a full and careful reading of the evidence in the record, that the testimony preponderated against the verdict of the jury upon these points, we would not be justified in setting it aside. We could not possibly obtain from a mere reading of the evidence as full and clear a view of the true facts of the case as the court and jury who tried it. The appellants insist that the jury were governed by passion and prejudice in the action, but it is not charged that the judge who tried the case was governed by any such feelings. He heard all the testimony of the witnesses as it was given to the jury, and the law has vested him with the power to grant a party, against whom a verdict has been rendered, a new trial, in all cases where, in his opinion, the verdict is against law, or the evidence is insufficient to justify it, or where the damages are excessive, and appear to have been given under the influence of passion or prejudice. This power is a very important one in the protection of the rights of parties litigating in court. Courts should be liberal in granting new trials in all cases where the judge who tried the case is satisfied that the verdict is not sustained by the evidence, or that the jury were influenced by passion or preju-

dice. The law has vested this power in the *nisi prius* courts, to be exercised discreetly, in order to secure the rights of all parties. Thus, the verdict should fairly accord with the judgment and convictions of the judge, as well as the jury, before the judgment rendered thereon should be allowed to stand. When a motion for a new trial has been made and overruled by the court below, the presumption is that the opinions of the judge and jury harmonize in support of the verdict. It is for that reason, and the fact that it is impossible for this court to form as correct a judgment and conclusion of the proper weight to be given to the evidence of the witnesses, that we decline, as a general rule, to set aside, upon such grounds, a verdict thus acted upon. The record in this action does not present a case which would justify us in departing from this salutary and established rule. As to the question of damages, the plaintiffs, as is usual in mining cases of this kind, labor under great difficulty in proving the exact amount of damages they have sustained, as the evidence of the amount of gold taken out by the defendants from the ground claimed by the plaintiffs, is necessarily almost exclusively confined to, or under the control of the defendants. The plaintiffs were compelled to rely to a great extent upon the judgment and estimates of men who were not fully acquainted with the facts. If this resulted in causing the jury to return too large a verdict of damages, the defendants are themselves principally to blame; for they had the means in their own power of showing the correct amount of gold taken out by them, or at least of making the most accurate estimate of the amount.

The fifth point assigned as error by the appellants is that the plaintiffs failed to connect themselves with the title of the original locators of their claim. They allege in their complaint the location of their claim in 1852 by certain persons, and that they have acquired the title of such original locators. They also allege that they were the owners and in possession of the mining ground at the time of the entry by the defendants. The defendants in their answer deny these allegations, and thus issue was taken upon them by the parties. If the plaintiffs proved by competent evidence that they were the owners and in possession of the mining ground at the time of the defendants' entry, they did all that was necessary to sustain their title and right of action. The presumption is that

the verdict of the jury is correct, and that the evidence was sufficient to sustain the verdict. This presumption is not rebutted by showing that the plaintiffs failed to deraign a title from the original locators to themselves, even though that kind of title was alleged in the complaint. The particular kind or character of title claimed by the plaintiffs was immaterial, so that they proved a better and superior right and title to the possession of the premises than that of the defendants. It was only necessary for them to prove by competent evidence that they were entitled to the possession of the premises in controversy, as against the defendants, to enable them to maintain the action. To do so it might or might not become necessary to trace their title back to the original locators of the claim. They introduced evidence sufficient to establish their right to the possession, and that is sufficient to sustain the verdict and judgment. It was not necessary to prove a transfer of the title by written conveyances; but a parol transfer with a delivery of the possession was sufficient, as has been repeatedly decided by this court: 14 Cal. 22; 20 Id. 198. This point therefore is not tenable.

The sixth point is that the item of costs inserted in the judgment should be stricken out, on the alleged ground that the bill of costs was not filed until after the judgment was entered, and after the court had adjourned for the term. The appellants referred to the case of *Chapin v. Broder*, 16 Cal. 419, to sustain their position. The record does not show that the bill of costs was filed after the entry of the judgment, or after the adjournment of the court for the term. From the record it would appear that the alleged grounds of this motion do not exist. But even if they did exist they would not be sufficient to sustain the motion of the appellants. After the decision in the case of *Chapin v. Broder*, the legislature, in 1861, (Stat. 1861, 494.) amended Sec. 511, thereby authorizing the clerk to insert the amount of the costs within two days after they shall have been taxed or ascertained in a blank left in the judgment for that purpose. This point is therefore overruled.

These are all the points assigned by the appellants; and as no error appears in the proceedings in the court below the judgment is affirmed.

Judgment affirmed.

MAYE ET AL. V. YAPPEN ET AL.

(23 California, 306. Supreme Court, 1863.)

Ignorance of boundary no defense in trespass. If the owner of a mining claim, in ignorance of the location of the boundary line between his claim and the one adjoining, work across such line and take away gold-bearing earth from the adjoining claim, such ignorance is no excuse for the trespass, and it is error to admit evidence of it in mitigation of damages.

The question whether the trespass was wilful or was ignorantly done is immaterial when plaintiff is entitled to recover only the damages actually sustained.

¹ **Estoppel—Statements as to boundary.** A statement by one of the plaintiffs to the defendants that they need not be uneasy, that they were not near the line, etc., coupled with other statements which indicated that the statement first made was a mere expression of opinion, does not show a license to work the plaintiffs' ground, nor estop them from claiming the damages which they sustained by reason of the trespass.

Negligence in ascertaining boundary. Defendants who have the means of ascertaining the exact boundaries of their mining claim, and who work across such boundaries in ignorance of their location, are guilty of negligence.

² **Value of the gold extracted, less cost of washing.** If a party in ignorance of his boundary lines enter upon an adjoining mining claim, and take away gold-bearing earth therefrom, the measure of damages in an action for the trespass upon the land, is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel. The expense of extracting or separating the gold from the earth after it is first moved from its original location, should be deducted from the value of the gold taken out.

Rule of damages dependent on form of action. The rule of damages depends, to some extent, upon the form of action, and in *trover* it has been held that the party whose property has been taken is entitled to the enhanced value until it has been so changed as to alter the title.

Appeal from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the court.

TUTTLE & FELLOWS, for appellants.

P. L. EDWARDS and H. O. BEATTY, for respondents.

¹ Compare *Patterson v. Hitchcock*, 5 M. R. 542; *Turner v. Baker*, 64 Mo. 218; 27 Am. R. 226; *Evans v. Miller*, 58 Miss. 120; 38 Am. R. 313.

² *Goller v. Fett*, 11 M. R. —; *Foote v. Merrill*, 54 N. H. 490; 20 Am. R. 151.

CROCKER, J., delivered the opinion of the court, COPE, C. J., and NORTON, J., concurring.

This is an action to recover damages, in the sum of \$2,000, which the plaintiffs allege they sustained by reason of the acts of the defendants in entering upon the mining claim of the plaintiffs, and taking away gold and gold-bearing earth of that value. The case was tried by a jury, who found for the plaintiffs damages in the sum of fifty dollars, for which amount judgment was rendered, and the plaintiffs appeal therefrom, and from an order refusing a new trial.

The appellants contend that they were entitled to a judgment for the sum claimed in their complaint upon the pleadings. It does not appear, however, that they made any motion for judgment on the pleading in the court below, and it is doubtful, therefore, whether the question can be raised in this court for the first time. But the answer of the defendants was sufficient to raise issues for trial, and this objection, therefore, is not well taken.

It appears that the plaintiffs and defendants are the owners of adjoining mining claims, which are worked by deep underground tunnels. The fact that the defendants mined over the dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed; but they contend that it was not done willfully or intentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface, and that they were led to work over the line, by the representations of one of the plaintiffs, as to its locality, in relation to the tunnel and the place they were working. On the trial, the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs in this action were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows that the question whether the defendants acted willfully and maliciously, or ignorantly and innocently, in digging up,

and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a certain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiffs to recover damages, or the amount of the damages to which they may be entitled, is not affected by the fact that the trespass was not willful in its character. The ruling of the court upon this question was therefore erroneous.

It appears that when the defendants first commenced working in the vicinity of the ground belonging to the plaintiffs, one of the plaintiffs went into defendants' tunnel, where they were working, and he was asked if he knew where the line was, to which he replied that he did not know exactly. Afterward, on the same day, the same plaintiff, Maye, stated to defendants that they need not be uneasy; that they were not near the line, and had forty or fifty feet still to run before they would reach it; and showed them a map of the plaintiffs' claim. The witness, who was one of the defendants, also stated that they only worked twenty-five feet further, and would not have done even that but for Maye's statement that they had fifty feet to go. Soon after this conversation the defendants employed a surveyor to run the line, and they then learned that they had worked over on the plaintiffs' claim. This state of facts, the defendants claim, amounts to a license or permission from the plaintiffs to work the ground; or they estop the plaintiffs from recovering the damages caused by the working of the ground. It is clear that the facts do not show a license or permission to work the mining ground of the plaintiffs. They show mutual ignorance on the part of one of the plaintiffs, Maye, and the defendants, as to the location of the line in the tunnel; but they do not show any permission or consent, or even intention or willingness on his part, that the defendants might work the plaintiffs' mining ground. Whether or not the permission of one of the plaintiffs would bind the others, it is unnecessary to determine.

The rules relating to the doctrine of estoppel with respect to the title of the property, laid down by this court in *Boggs*

¹Followed in 16 Cal. 626; 17 Id. 403; 23 Id. 15; 24 Id. 281; 26 Id. 40; 31 Id. 153; Id. 494.

v. *Merced Mining Co.*, 14 Cal. 367 , are as follows: 1st. That the party making the admission by his declarations or conduct was apprised of the true state of his own title. 2d. That he made the admission with express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud. 3d. That the other party was not only destitute of all knowledge, but of the means of acquiring such knowledge; and, 4th. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved. It is evident that the facts of the present case do not bring it within the rules thus laid down. Maye, who made the statements, expressly stated that he did not know where the line ran in the tunnel; thus showing that he was not apprised of the true location of the plaintiffs' line under ground. His statements were, therefore, more in the nature of the expression of an opinion than an admission of facts. The location of the line on the surface of the ground was well known to both parties, or could have been readily ascertained; and the defendants, therefore, had the means of ascertaining, by means of a survey, the exact location of the line in the tunnel, and they were guilty of negligence in not informing themselves of this fact, especially when they knew that Maye did not himself know exactly where the line ran. The defendants had no right, therefore, to rely upon this statement of Maye's opinion, when he distinctly stated his own ignorance of the fact. They can not therefore claim that it would operate as a fraud upon them to permit the plaintiffs to show the true location of the line, and to recover the damages caused by the trespass, that being the foundation of the doctrine of estoppel. It may be a question whether the relation of the plaintiffs to each other was such that the admissions of one would operate as an estoppel against the others, but that is a point not necessary to determine.

Upon these points, the court gave the jury the following instruction: "If the jury believe from the evidence that the defendants were ignorant of the boundary lines between the plaintiffs and defendants, and, in such ignorance, if they entered upon the ground of the plaintiffs in good faith, believing it to be their own, and were induced to do so by the acts and representations of plaintiffs themselves, then they will find for the defendants." This instruction was clearly erroneous. It

does not correctly state the law upon this subject, as has already been shown.

The court also gave the following instruction, which the appellants assign as error: "If the jury believe, from the testimony, that defendants entered upon plaintiffs' ground in good faith, believing it to be their own ground, and were misled into so doing by the acts or declarations of plaintiffs, then, if the plaintiffs recover at all, they can only recover the net sums taken from plaintiffs' ground, over and above the expense of extracting it." The plaintiffs claim that the rule of damages in such cases is the value of the property after it is separated from the freehold and becomes a chattel, or the value of the gold after it is extracted from the earth.

In the case of *Martin v. Porter*, 5 M. & W. 352, which was an action of trespass *quare clausum fregit*, for entering a certain coal mine and carrying away the coal, and converting and disposing thereof to the use of the defendant, the plaintiff claimed that he had a right to hold the defendant liable for the value of the coal where gotten, and where it first existed as a chattel, without any deduction for the expense of getting it. The judge at *nisi prius* held that in an action of trover the plaintiff would have been entitled to the value of the coal as a chattel, either at the mouth of the pit or on the canal bank, if he had demanded it at either place; and the defendant had converted it, without allowing the latter anything for having worked and brought it there; but the action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth; and the jury found a verdict accordingly. The defendant moved the court to reduce the damages to the average estimated value of the coal as lying undisturbed in its native bed. The court refused the motion, holding that the rule had been correctly laid down by the judge at the trial. The same rule was also adopted in *Wild v. Holt*, 9 M. & W. 672, and *Morgan v. Powell*, 3 Q. B. 278.

In *Wood v. Morewood*, (cited in 3 Q. B. 440,) it was held by Parke, Baron, at *nisi prius*, that if there was fraud or neg-

ligence on the part of the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coal, as if the coal field had been purchased from the plaintiff; and the jury adopted the latter estimate.

The case of *Cushing v. Longfellow*, 26 Me. 306, was an action for *trespass* for cutting and removing mill logs. The plaintiff claimed the right to recover the value of the logs at a certain landing place, and the defendant contended that the damages should be estimated according to the value of the timber when standing; but the court held that the plaintiffs should recover the value of the logs as they were the moment after they were severed from the freehold. They also held that the plaintiff might have demanded the logs at another place, and in an action of trover have recovered the value of them there.

In *Baker v. Wheeler*, 8 Wend. 505, which was an action of trover, it was held that the party whose property has been tortiously taken is entitled to the enhanced value until it has been so changed as to alter the title; and it was held to apply to saw logs converted into boards and plank, timber made into shingles, and wood converted into coal: *Brown v. Sax*, 7 Cow. 95; *Babcock v. Gill*, 10 Johns. 287; *Curtis v. Groat*, 6 Id. 168; 5 Id. 348.

It will be noticed that the rule of damages in such cases depends, to some extent, upon the *form* of the action, whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been two thousand dollars. No demand of the possession of the gold after it was separated from the earth appears to have

been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages, in a case like the present, is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages, the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs. The instruction of the court upon this point is very nearly correct, but it is proper that the rule should be accurately stated to the jury. The difference in the amount of damages may or may not be great, but we have no means of determining whether it is large or small.

The judgment is reversed and the cause remanded.

HARVEY V. THE SIDES SILVER MINING COMPANY.

(1 Nevada, 539. Supreme Court, 1865.)

¹ **Dump deposits—Damages limited to value of land.** Where the plaintiff claimed damages for the deposit of a dump pile from a quartz lode upon his building lot, and it was shown that the cost of removing the dump would be greater than the value of the premises, the measure of damages is limited by the value of the lot, although, in ordinary cases, the measure of damages would be the cost of removal.

Appeal from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING, presiding.

The facts appear in the opinion of the court.

PERLEY & DeLONG, for appellant.

HILLYER & WHITMAN, for respondent.

¹ *DeCosta v. Mass. Co.*, 10 M. R. 92.

By the Court, LEWIS, C. J.

The facts in this case, as presented to us by the transcript, are substantially as follows: In July, A. D. 1863, the plaintiff purchased a certain lot in the city of Virginia, near the quartz lode claimed by the defendant, from persons claiming to have located it in 1860. Shortly after the conveyance to him he graded about two thirds of it, and built a dwelling-house thereon at a cost of four thousand five hundred dollars, and inclosed the lot with a fence and stone wall. That the defendant, whilst sinking a shaft upon its ledge, deposited from one thousand to fifteen hundred tons of earth and rock on that part of the lot not graded or improved, broke down the fence and stone wall, and by turning water upon the lot destroyed the plaintiff's cellar; by reason of which he suffered an actual damage of about eight hundred and fifty dollars, besides the loss of three weeks' rent of his house, and the use of that portion of the lot upon which the earth is deposited. The plaintiff claimed five thousand dollars damages, and recovered three thousand eight hundred. A motion for a new trial having been made by the defendant, and granted by the court below, plaintiff appeals.

Upon submitting the case the judge charged the jury, that the true measure of damage was the sum of money that it would require to remove the dirt from the plaintiff's lot, with a reasonable compensation for injury to buildings and fencing, together with the amount of rent which was lost by reason of the unlawful acts of defendant.

If the jury were misdirected as to the law in this instruction, the new trial was properly granted. Under some circumstances the instruction would perhaps be perfectly correct, though clearly erroneous upon the facts as presented to us in this case. The measure of damage for injury to property is not always the sum of money which it would take to repair the injury, or to restore the property to the condition it occupied before the injury. In those cases, where the cost of restoring it to its original condition will exceed its actual value (which may often be the case), the value of the property and not the cost of removing the injury complained of, would be the proper measure of the damage. If the rule announced in

the instruction were to be followed in all cases of this character, the damage recovered might often greatly exceed the value of the property appropriated or trespassed upon. In this very case, suppose the plaintiff had no improvements on the lot, and its real value would not exceed one thousand dollars, can it be claimed that the plaintiff would be entitled to recover what it would cost to remove the earth, which would exceed by two thousand dollars the actual value of the entire lot? As it is, had the jury taken the highest cost estimated by the witnesses for removing the dirt, it would have amounted in the aggregate to six thousand dollars, a sum exceeding the entire value of the property, whilst the plaintiff continues in the enjoyment of his dwelling house and two thirds of his lot, and which do not appear to have suffered any permanent depreciation from the deposit of earth on the rear of the lot. If the dump pile were a continuing injury, rendering the balance of the lot less valuable, and the house less convenient, and the cost of removing the dirt would not exceed the damage thus suffered by the plaintiff, it might have been correct to charge the jury that the proper measure of damage would be the cost of such removal; but, on the other hand, if the cost of removing the earth would exceed the damage suffered by plaintiff, it would be error so to charge them.

Where an injury is done to a building, as in the case of *Walter v. Fort*, 4 Abb. Pr. 389, cited by counsel for appellant, the cost of putting it in as good condition as it was before the injury would be the proper measure of damage; for in most cases of the kind such cost would, in fact, be the actual damage suffered by the complainant, though where there was a total destruction of a building it was held that the value of the building, and not the cost of rebuilding it, was the proper measure of damage: *Wylie v. Smitherman*, 8 Ire. 236. So in *Jones v. Gooday*, 8 M. & W. 146, the English court of exchequer held that the proper measure of damage in an action of trespass for entering upon the plaintiff's close and carrying away the soil was the value of the land removed, and not the expense of restoring the premises to their original condition.

Though the charge given by the court in this cause might be correct in some cases, it is not the rule where, as in this case, the cost of restoring the property to its original con-

dition might exceed its value or the actual damage sustained by the plaintiff. The new trial was therefore properly granted.
Ordered accordingly.

HILTON V. WOODS.

(L. R., 4 Equity, 432. Before the Vice Chancellor, 1867.)

Champertous contract not preventing recovery. Plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of his suit to recover certain coal mines, upon being indemnified against costs. *Held*, that the contract amounted to champerty and maintenance, but that the plaintiff was not disqualified from suing where his title was vested in him before he entered into such contract. A decree was therefore made in his favor, but without costs.

If the solicitor had sued in such case upon a title derived under such a contract, the bill would have been dismissed.

¹ **Measure of damages—Coal taken inadvertently.** In assessing compensation for coal already gotten by the defendant, where the court was of opinion that he had worked it inadvertently and not fraudulently: *Held*, that he was to pay only the fair value of such coal as if he had purchased the mine from the plaintiff.

This bill was filed for the purpose of establishing the plaintiff's right to the coal mines under certain lands, containing about forty-seven acres, at Blackrod, near Wigan, in the county of Lancaster.

It was proved in the cause that James Hilton, the plaintiff's father, was seized in fee of the lands in question in and prior to the year 1820; that he, together with his mortgagees, by lease and release of the 26th and 27th of January, 1820, conveyed them to one Nicholas Marsh, reserving to himself in fee, all the mines and beds of coal lying thereunder; and that the mines descended on the plaintiff as his father's heir.

The surface of the lands so conveyed to Nicholas Marsh had, in the year 1853, become vested in Mr. Dodsley, who sold them to the trustees of a will, under which Lord Kingsdown was the tenant for life.

The defendant, Henry Woods, was the owner of adjacent

¹ *In re United Co.*, 10 M. R. 153.

mines, and in the year 1859, being desirous of working the mines now in question from an adjoining pit, he endeavored to discover the owner of them.

Lord Kingsdown set up no claim to these mines, and, under the circumstances, the defendant applied to Mr. Dodsley, the former owner of the surface, and it was then considered that if no other owner could be found, Mr. Dodsley would be entitled; and after some negotiation between the defendant and Mr. Dodsley, the latter, in consideration of £800, conveyed the mines under nine acres of the land to the defendant, and under such supposed title the defendant proceeded to work the coal.

At this period the plaintiff was in complete ignorance of his title, and so he would have remained if he had not been informed of it by Mr. Wright, who was the agent and local solicitor of Lord Kingsdown.

The bill was filed in April last, and it prayed an injunction to restrain the defendant from continuing to dig and get coal or canal under any of the lands belonging to the plaintiff; that an account might be taken of the coal which had already been worked or procured by the defendant and the prices obtained by him for the same; that an account might also be taken of the coal which had been brought through the plaintiff's mines, so worked by the defendant, from other mines, and that the defendant might be ordered to pay a proper sum for the advantage he had derived from bringing such coal through the plaintiff's mines, and that the defendant might pay the costs of this suit.

The defendant, in an affidavit filed in the cause, stated that in the year 1858 he was the lessee of the coals under the lands of Mr. Haliburton, adjoining the Shoemaker's Fold estate, which formed part of the property upon which the coal was now claimed by the plaintiff, and being desirous of buying the coals under the latter estate, he applied to Lord Kingsdown's solicitor to sell the mines to him, but was informed that Lord Kingsdown was not the owner of the mines. He then made further inquiries and heard that Mr. Dodsley was the owner of the mines, and he entered into negotiations with Mr. Dodsley, who stated that no person had a better title to the mines than himself. In pursuance of these negotiations, an indent-

ure dated the 20th of October, 1859, was executed between Mr. Dodsley and the defendant, whereby in consideration of £800 paid to J. Dodsley by the defendant, the said J. Dodsley conveyed to the defendant and his heirs all the estate, right, title and interest, at law and in equity, of him, the said J. Dodsley, in all and every, the mines, minerals and metals under or upon the lands and hereditaments called the Shoemaker's Fold estate; that the said J. Dodsley at the same time made a statutory declaration that he had been in possession of the estate called Shoemaker's Fold from December, 1841, up to the year 1854, when he sold and conveyed the same (excepting the mines thereunder) to the trustees of the late Sir Robert Leigh, and during the whole period of his possession no claim was made by or on behalf of any person to the mines. The defendant further stated that he had not worked the coals surreptitiously, but that the fact of his working them was a matter of notoriety and the mines had been visited by several mining surveyors resident in the neighborhood.

The plaintiff, upon being cross-examined in court upon his affidavit filed in support of the bill, stated that he was a stockholder; that about eighteen months ago Mr. Wright, who was the agent of Lord Kingsdown's estates at Wigan, called upon him and asked if he was aware that he was entitled to some coal mines under the Hilton house estates. Witness expressed his doubt as to his title, and did not at first feel willing to insist upon it. Mr. Wright then said he was so clear about it that he would guarantee him against any costs. An arrangement was thereupon verbally made between him and Mr. Wright, to the effect that, in consideration of such guarantee, Mr. Wright should have a portion of the value of the property, that is, whatever he should make of it. Witness then searched among some old papers and found certain deeds, and a variety of other papers, which were the foundation of his title.

Mr. BAILY, Q. C., and Mr. WRIGHT, for the plaintiff.

Mr. GLASSE, Q. C., and Mr. MARTINEAU, for the defendant.

The vice-chancellor decided that the plaintiff had clearly

established his title to the mines in question, but reserved his judgment upon the point that was raised as to champerty and maintenance.

June 28th. SIR R. MALINS, V. C.

At the close of the argument I decided that the plaintiff had established his title as the son and heir of James Hilton, who reserved the mines to himself, by the conveyance of March, 1820.

But it was strenuously urged by the counsel for the defendant, that the bargain between the plaintiff and Mr. Wright, under which this suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue; and that I was therefore bound to dismiss the bill, or to make the plaintiff pay the costs of the suit; or that I ought not, at all events, to give him any costs.

I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that, whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will, on that account, necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it, by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff, suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill. This would have followed from the decisions in *Harrington v. Long*, 2 My. & K. 590; *Stanley v. Jones*, 7 Bing. 369; *Reynell v. Sprye*, 8 Hare, 222, 1 D. M. & G., 660; *Sprye v. Porter*, 7 E. & B. 58; *Simpson v. Lamb*, Id. 84; and *Earle v. Hopwood*, 9 C. B. N. S. 566. I do not refer in detail to those cases, but some of them are cases in which the plaintiff sues by virtue of a title derived under a contract which amounts to maintenance; and others, as in

Reynell v. Sprye, are bills to set aside the contracts on the ground that they are tainted with that objection.

In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into the improper bargain with Mr. Wright, and I can not, therefore, hold him to be disqualified to sustain the suit.

But as any decree I may make for the defendant to pay costs, would, in effect, go to exonerate Mr. Wright from the consequences of the improper contract he has entered into with the plaintiff, and would to that extent be for his benefit, the decree I shall give the plaintiff will be without costs. I am the more reconciled to not giving the plaintiff costs, because the neglect of his own rights has placed the defendant in a position of considerable difficulty. (His honor here stated the facts set forth in the defendant's affidavit, as to the manner in which he obtained a conveyance of the coal). This difficulty would not have arisen if Mr. Hilton had known the effect of the deeds which were in his possession. The plaintiff is, however, entitled to a declaration of his right to the mines in question, and to the injunction which is asked for against the future working of the coal by the defendant, and to compensation for the value of the coal which has already been worked by the defendant.

There is much difficulty as to the mode of assessing the compensation to an owner of coal, which has been improperly worked by the owner of an adjoining mine. It is clear, upon the authorities, that a different principle is applicable when the coal is taken inadvertently, or, as in the present case, under a *bona fide* belief of title, and when it is taken fraudently, with full knowledge on the part of the taker that he is doing wrong, or in other words, committing a robbery. In such cases it may be proper to apply the strict rule laid down in *Martin v. Porter*, 5 M. & W. 351, which is to charge the value of the coal without allowing any of the expenses of getting it. But in cases where no such ingredients have existed a milder rule has been applied, as in *Morgan v. Powell*, 3 Q. B. 278, and *Wood v. Morewood*, 3 Q. B. 440, n. In the latter case a rule was adopted by Lord Wensleydale, which I shall follow on the present occasion. That was an action under circumstances similar to the present, by which the

plaintiff complained that the defendant had worked from the adjoining pits into the plaintiff's mines. The circumstances are stated which led to the belief on the part of the defendant that he was entitled to do so. He had won the coals under the closes *bona fide*, supposing that these were his own, under a title obtained from another person. On the principle of *Martin v. Porter*, the damages would have amounted to between £10,000 and £11,000. Sir William Follett, for the defendant, contended that the jury were the proper judges of damages, and that in that case, where there was no imputation of fraud, or want of reasonable care and caution on the part of the defendant, they might assess the damages on the principle that the defendant should pay the fair price per acre, at which the bed of coal would have been sold to a person who was to be at the expense of getting it.

Mr. Baron Parke told the jury, that if they found for the plaintiffs, they were to determine what damages should be given; that if there was fraud or negligence on the part of the defendant they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*, 5 M. & W. 351; but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff. The jury adopted the latter estimate and found for the plaintiff damages £210 per acre, which amounted to £2,310, instead of £10,000 or £11,000. No motion for a new trial was made; that decision was acquiesced in, and that is the principle which I intend to apply to the present case; then, applying that principle, the decree will be a declaration that the plaintiff is entitled to the mines; the injunction, according to the prayer of the bill; an account of what quantity of coals belonging to the plaintiff have been worked by the defendant, and what he is entitled to in respect of such coals; but in taking that account, I propose to declare that, in estimating the amount to be paid by the defendant for the coal gotten by him, he is to be paid the fair value of such coal, as if the coal field had been purchased from the plaintiff by the defendant at the fair market value of the district.

There is only one other topic urged, which is that the plaintiff is also entitled to compensation for the way-leave, as it was called; that is, a sort of rent for the coal obtained from property which he has taken through the property of the plaintiff. I am not very much impressed with that argument, for it is impossible that anybody can say that any damage has been done to the plaintiff in consequence of the defendant leading coal. I will not, however, preclude the question, and therefore I will also make that the subject of reference, whether the plaintiff is entitled to any, and what, compensation for the way-leave through his property for the coal got under other property than that of the defendant. This decree, as I have already said, will be without costs. I ought to add that in coming to this conclusion I consider I am acting in perfect conformity with the views of vice-chancellor Wood, as expressed in *Powell v. Aiken*, 4 K. & J. 343.

THE PITTSBURG COAL CO. V. FOSTER ET AL.

(59 Pennsylvania State, 365. Supreme Court, 1868.)

Failure to deliver engine for transporting coal. Foster & Co. contracted to furnish defendant, on the first of February, an engine to draw coal cars on a track of unusual width. The engine was not delivered until May. Foster & Co. having sued for the price, defendant showed in proof that an engine for such track could not be hired, and that he had to transport his coal by horses. *Held*, that evidence of the difference of cost of transportation between horse power and by the engine during the period of delay was admissible on the question of damages.

General test. Damages ordinarily recoverable are those necessarily following the breach which the defaulting party might be presumed to know would result from his failure.

¹Damages too remote. Evidence that the defendants could have moved and hauled more coal with the engine than with horses, to show the profits from the increase, was inadmissible, being too remote.

Interested witness. A witness can not purge himself of interest by his own *voir dire*.

Transfer book not proved by inspection. That a certain book is the transfer book of a corporation can not be proved by inspection. Corporation books do not prove themselves.

¹ *Chicago R. Co. v. Hale*, 83 Ill. 360; 25 Am. R. 403; *McKinnon v. McEwan*, 48 Mich. 106; 42 Am. R. 458.

Error to the District Court of Allegheny County.

This was an action of assumpsit by Alexander W. Foster and another, trading as Foster & Co., against the Pittsburg Coal Company. The writ was issued July 21, 1866.

The action was founded on the following agreement.

"PITTSBURG, October 24, 1865.

"To JAMES M. BAILEY, President of Pittsburg Coal Company.

"We agree to build a locomotive engine (not exceeding 6 feet in width or height, including stack), to fit a 40 inch track. * *
* The whole to be of the best material, and built in a workmanlike manner, and finished by the 1st day of February next, and put in thorough running order on your track on or before that day. * * * Our price is five thousand five hundred dollars; one thousand five hundred to be paid us on the 16th day of January next, and the balance when engine is completed and running on your road.

"FOSTER & Co."

"I agree to the above.

"JAMES M. BAILEY,

"President Pittsburg Coal Co."

The statement of plaintiffs' claim included some extra work, and amounted to \$5,596.31, with a credit of \$1,500 cash paid them, making the balance due, \$4,096.31.

The plaintiffs gave in evidence the foregoing agreement, the delivery of the engine, etc., and rested.

The defendants called James M. Bailey. He was objected to as interested. The court rejected the witness because, being president of the company, he is presumed to be a stockholder and *prima facie* interested. The defendants then proposed to examine Mr. Bailey on his *voir dire* as to his interest. He was again objected to on the ground that it could not be shown by the witness that his interest had ceased. The court rejected the witness for the reason stated. The defendants offered the transfer book of the company, without proof that the book was what it purported to be. On objection it was rejected for the reason that the court could not determine its character by inspection.

The defendants next offered the deposition of P. F. Geisse, in which the witness testified that in September or October, 1865, he proposed, by letter, to build a locomotive engine for Mr. Bailey in four months. The letter did not contain the details, it merely proposed the price, \$4,200. Mr. Bailey wanted it in three months, and declined the proposition for that reason, etc. The object of the deposition was not stated in the offer and was rejected. Several bills of exception were sealed by the court to the rejection of the foregoing offers. The defendants then proved that the engine was brought on to the road in the latter part of April, and that up to that time they had hauled coal with horses and mules. They also gave evidence that locomotive engines are not kept on hand for sale; that the track was of an unusual width, with other evidence tending to show that an engine to run on such a track could not be procured by hiring; also evidence of the value per day for the hire of an engine costing \$5,500, and other evidence bearing on the question of damage sustained because of the non-delivery of the engine at the time stipulated in the contract.

The defendants then proposed to prove "the amount or quantity of coal transported over defendants' road from the 1st of February until the time that the engine built by the plaintiffs was put in running order on the road, and the cost and expense of transporting the same by means of horses and mules, and what would have been the cost and expense of transporting the same by means of the engine, if the same had been completed and put in running order on the 1st of February, the time stipulated in the contract—for the purpose of showing the damages actually sustained by the defendants by the failure of the plaintiffs to complete and deliver the engine in running order on defendant's road at the time provided in the contract—the defendants claiming that the difference in the cost and expense of the two modes of transportation is the measure of damages in this case; the defendants having already shown that engines are not kept on hand for sale, but are built and furnished by contract. And the defendants offer to show in connection with their offer that there was no other possible mode of transporting coal over the said road except by means of horses and mules, and by steam engines, and that at the time of making the contract the defendants transported the same by means of horses and mules."

The offer was objected to and overruled, and a bill of exceptions sealed.

They then proposed to prove "the facts contained in the preceding offer, and in connection therewith that by the use of the engine the defendants could have mined, hauled and sold a much larger quantity, to wit, one third more coal than they could by the other means of hauling in their power, and the profits that would have resulted to the defendants therefrom."

The offer was overruled, and a bill of exceptions sealed.

The plaintiffs asked the court to charge the jury:

2. The measure of damages for the delay is the ordinary hire for such a locomotive during the period of such delay, credited with a reasonable percentage on such hire for the wear and tear of such a locomotive.

The court (WILLIAMS, A. J.), answered:

"2. The court has already ruled in answer to the defendants' offer of evidence, that the measure of damages for the plaintiffs' failure to complete and deliver the locomotion in good working order, at the time mentioned in the contract, is not the difference in the cost of transporting the coal actually mined by them, or which might have been mined, during the period of the delay, by means of horses and mules, and the cost of transporting the same by means of the locomotive, if it had been delivered in good working order, according to the contract; but that the measure of damage is the actual or probable cost of the hire of such a locomotive, for the period of such delay. We think this is the true rule or measure of damages. And accordingly, we allowed the defendant to call, as witnesses, men engaged in railroad transportation, familiar with the cost of engines and the price of their hire, to testify as to the *per diem* value of the use or hire of such an engine as the one in controversy. One of the witnesses estimates the sum of \$20 per day to be a fair price for the hire of such an engine. The other says that \$10 per day would be a fair price for the use or hire of such an engine. It will be seen that these witnesses differ very widely in their estimates. Their opinions, if not mere conjectures, must be founded on a different basis. While their opinions are evidence, they are not the only evidence in the case. The jury have the evidence as to the price or cost of the locomotive, viz., \$5,500. Then

they have the testimony of the witness that such an engine, by careful and proper use, will last twenty years. And it will be for the jury to determine whether the hire of an engine costing only \$5,500, and which, if kept in the proper repair, will last twenty years, is worth \$20 per day, as estimated by one of the witnesses, allowing three hundred working days in the year; this would make \$6,000 for the hire for one year, a sum which would more than equal the cost of the locomotive and the interest thereon for a year.

“And then, after having more than paid for itself in the first year, it would be earning the same amount for nineteen years longer, supposing that it would last as long as the defendants’ evidence shows that it would. If the jury, then, should find that \$20 per day was too high an estimate, is \$10 a reasonable sum? At this rate the engine would more than pay for itself, including interest on the price, in two years, and in twenty years would pay more than ten times the price or value thereof. It seems to me that the estimates of both the witnesses are too high; but this is a question for the jury, and they will allow such an amount as they may think right and proper, under all the evidence.

“Undoubtedly the defendants are entitled to some damages for the delay; such damages as would be reasonable and proper for the delay, unless it was waived by the defendants, and the burthen of establishing such waiver, as we have already instructed the jury, is on the plaintiffs. If the delay was not waived by the defendants, the jury will allow as damages therefor, such an amount as they may deem reasonable and fair for the use or hire of such a locomotive, during the time of the delay, and deduct it from the price of the engine or locomotive.”

The verdict was for the plaintiffs, for \$3,875.

The defendants took out a writ of error. They assigned for error, the rejection of their offers of evidence and the portion of the charge quoted.

J. H. BAILEY, for plaintiffs in error.

C. B. M. SMITH, for defendants in error.

AGNEW, J., delivered the opinion of the court.

The only question we need discuss in this case is that relating to the measure of damages. The defendants below offered in substance to prove the difference in the expense of transporting the coal carried on their railroad, between horse or mule power and steam power, and for this purpose to prove how much coal was actually carried over their railroad between the first day of February, the time for the delivery of the engine under the contract, and the day when the engine was actually put in running order on the road, claiming that this difference of expense was a loss directly occasioned by the failure to finish and deliver the engine in time.

The learned judge overruled this offer, being of opinion that the measure of damages for the delay was the ordinary hire of a locomotive during the period of the delay. We think that under the circumstances of the case this was an error. It was in proof, and was also a part of the offer, that the only means the defendants had of transporting their coal was by horses and mules; and it also appeared in the evidence that, owing to the gauge of the railroad track and the kind of engine required for their use, it was impossible to have procured for hire an engine to suit their purpose, and that the hire of such an engine was purely a speculative, and not a practical question, owing to the fact that the witnesses knew of none such to be had.

The true inquiry which arose under these circumstances, was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively within the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendants' track by the first of February. The damages ordinarily recoverable are those necessarily following the breach, which the party guilty of the breach must be presumed to know would be the probable consequence of his failure: 2 Greenl. Ev. § 253. This rule is well expressed by STRONG, J., in *Adams Express Co. v. Egbert*, 12 Casey, 364. They must be a proximate consequence of the breach, not merely remote or possible; there is no measure for losses of the latter kind. "But, on the other

hand," he remarks, "the loss of profits or advantages, which must have resulted from a fulfillment of the contract, may be compensated in damages when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made."

This statement of the rule is quoted with approbation by THOMPSON, J., in *Fessler v. Love*, 12 Wright, 410. The subject is also discussed at large by myself in *Fleming v. Beck*, same volume, 312; and the same rule in substance quoted from *Hadley v. Baxendale*, 26 Eng. L. and Eq. 398.

That the loss in this case was immediate and the necessary consequence of non-fulfillment, is obvious. The coal company was by the contract to have a finished locomotive, adapted to their railroad, put in thorough running order upon their track by the first day of February; the direct consequence of not getting it was, that they were obliged to continue transporting their coal as before, by horses and mules, until the engine was put there. It is quite as clear, also, that this consequence must have been in full view of Foster & Co., when they entered into the contract. The instrument evidencing the agreement was a proposition of Foster & Co., accepted by the president of the coal company. It was directed to James M. Bailey, president of the Pittsburgh Coal Company, and proposed to build a locomotive engine, to fit a forty-inch track. It was to be built in a workmanlike manner, of the best material, and finished by the first day of February then next, and "put in thorough running order on your track, on or before that day."

The price, \$5,500, was to be paid, to wit: \$1,500 on the 16th day of January, "and the balance when the engine is completed and running on your road." Thus the proposition to build the engine shows very clearly that Foster & Co. knew that it was to be used in running on a coal railroad, and upon a track of unusual gauge, and the proof shows that at the time of the making of the contract, engines of the size and character of the one described in the proposition were not in ordinary use and could not be hired. From the nature of the circumstances, Foster & Co., as engine builders, must have known that if they failed to deliver the engine on the track by the day

agreed upon, the coal company would be forced to continue transporting their coal by their former means, and consequently would suffer a loss in the difference of expense of transportation between the old mode and the one stipulated for in the contract.

To this extent, therefore, we think the court below erred in rejecting the testimony. But the superadded offer, when the proposition was renewed, to prove that the defendants could have mined and hauled one third more coal with the engine than by the old mode, and to show the profits arising thence, was rightly rejected by the court.

While it is obvious that Foster & Co. must have known that their failure would compel the company to continue in the use of their old mode of transportation, it can not be fairly inferred that they would know that the possession of the engine would enable the company to mine more coal and also to haul more. This is a possible or remote consequence, but not a necessary one. For aught Foster & Co. could know, the defendants were mining to the extent of their ability to operate in the mines; and even could they mine more, it does not follow they must know that the engine would haul more in the same time than the company could do with their horses and mules. The principles governing this offer are stated pretty fully in *Fleming v. Beck*, 12 Wright, 312.

The reversal of the judgment renders the rejection of James M. Bailey as a witness unimportant, for on the next trial the charter can be given in evidence showing that the president of the company must be a stockholder, and if he be offered, it must be shown that he has since transferred his stock.

Presuming Bailey to have been interested, it was clearly right to reject his oath as a means of divesting himself of his interest. An interested witness can not be offered to purge himself of his interest by his own *voir dire*. The refusal to receive the transfer-book without evidence of its true character being given, was also right. Corporation books do not prove themselves.

The rejection of Geisse's deposition was also right. At the time of offering it, no competent purpose was stated as the ground for its reception; and so far as the court could discover upon its face, it did not seem to be relevant to any such pur-

pose. It is the duty of a party to state the purpose of his offer, if the evidence is not obviously competent on its face. A court is not bound to search for some distant relevancy that may exist, but which can not readily be discerned without the attention of the court being directed to it.

But for the error as to the true measure of damages, the judgment must be reversed.

Judgment reversed, and a venire facias de novo awarded.

¹CRATER V. BINNINGER.

(33 New Jersey Law, 513. Court of Errors and Appeals, 1869.)

²**Proximate cause of damage.** The rule of damages in cases of fraud or breach of contract is that they must be the natural or proximate consequence of the act complained of, and those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract.

³**Fraudulent sale of interest in oil speculation—Deducting value of interest retained by plaintiff.** The defendant, by false representations, induced the plaintiff to enter into an oil speculation and to take a one eighth interest at a price much above the original cost of the land. The speculation was a failure: *Held*, that ordinarily the measure of damages would be the entire loss sustained by the plaintiff in the transaction into which he was inveigled, less the value of the interest which the plaintiff still held in the land.

Moneys advanced for purchase. When a defendant is fraudulently led into a losing speculation, moneys put into the scheme and lost in the ordinary course of the adventure may be considered as proximate and recoverable damages.

Where the vendor avers his land cost a certain price and that the vendee may come into the venture at cost price, whereas in fact the original cost was less than represented, the vendee is entitled to damages to the extent of the difference.

Error to the Supreme Court.

The defendant had purchased, in connection with another party, a certain tract of land situate in Pennsylvania, in the district known as the Petroleum Oil Territory. Proposing to form an oil company, he applied to the plaintiff and solicited

¹ *Same v. Same*, 11 M. R. —.

² *Pittsburg Co. v. Foster*, 10 M. R. 116.

³ *Page v. Parker*, 6 M. R. 545.

him to become a member. The defendant represented that the original cost of the land was \$28,000, and that the scheme would require a working capital of \$4,000, making the amount of immediate investment \$32,000. His proposition was to divide the property into eight shares of \$4,000 each, and one of which he offered to the plaintiff, which the latter accepted and paid for. In a few months the associates finding themselves in debt for expenses incurred in the enterprise, each paid in the further sum of \$500. A small portion of the property was subsequently sold, with the assent of all the members, for the sum of \$16,000. The property purchased, originally had been conveyed to the defendant in trust for the members of the association. The speculation turned out a failure.

The suit was brought for alleged false and fraudulent representations made by the defendant, forming the inducement to the plaintiff to become an associate in the enterprise. The false representation relied on consisted in the statement that the original cost of the property was \$28,000, whereas the real price paid did not exceed \$18,000.

The court at the circuit charged the jury that the proper measure of damages was the entire loss sustained by the plaintiff in this transaction, into which he was inveigled by the fraud of the defendant. The estimate of damages was made on the basis of the original outlay by the plaintiff of \$4,000, his subsequent advance of \$500, with a deduction of \$2,000, being the one eighth of the portion of the land sold for \$16,000. The residue of the land standing in the name of the defendant in trust was not taken into the account.

Bills of exception were sealed, and the case came before this court on a writ of error to the circuit.

A. W. CUTTER and THEO. RUNYON, for plaintiff in error.

C. BORCHERLING and C. PARKER, for defendant in error.

BEASLEY, Chief Justice.

Upon the argument, one of the grounds in favor of a reversal in this case, which was pressed upon our attention, was, that the measure of damage which should have been given on the trial to the jury, should have been one eighth of the dif-

ference between eighteen thousand dollars, the real cost of the property sold, and twenty-eight thousand dollars, the false price, constituting the fraudulent representation. But I can find nothing in the reason of the thing, nor in the precedents, for the adoption of such a standard. Regarding this case simply as a sale of lands, which is the view most favorable to the contention, this rule could not be, in any case, applied with propriety. The principle of justice, and as I understand of law, is, that the party injured is to be compensated, at least to the extent that redress is awarded judicially, for the actual loss sustained. The effort is to reach this measure as near as possible, and unless in cases fit for punitive damages, nothing more than this is to be given. But the criterion contended for is in no sense compensation, but a mere arbitrary amount, bearing, it may be, no just relation to the quantum of damage. Let us suppose land costing \$5,000, to be sold under a false representation that it cost \$10,000. Now it is obvious, that the damage which the vendee will sustain, under ordinary circumstances, will be the difference between what he pays for the land and its actual value. If he pay \$10,000, the price falsely represented as its original cost, and it be worth that sum, and he actually sell it at that rate, he will sustain, in point of fact, no damage whatever. Can it be pretended, then, that in such a state of affairs, sustaining no loss, he would be entitled to recover anything whatever because of the fraud practiced upon him?

Nor can I perceive how this rule, sought to be established, can properly be received for the purpose of establishing the ultimate limit to which damages are to extend. There appears no reason for circumscribing the damages of a vendee of property to the difference between the actual and represented cost price of the property. It is obvious that often his loss will exceed such bound. If the fraudulent representation has been the sufficient cause of the purchase, the actual loss sustained would seem to be the proper and usual measure of redress. But if, on the other hand, the effect of the fraud has been merely to induce the payment of a larger price than would otherwise have been paid, then there would seem to be some substantial ground for the theory that the sum recovered should be the sum comprised in the over-estimate of the cost of the property. In this latter case, upon the assumption that

the sale would have taken place if the truth had been known, all that the fraud produced is the payment by the vendee of an excessive price; the reduction, therefore, of such excess would afford a fair reparation. But where the sale itself is the product of fraud, the vendee may either repudiate the contract, or claim, by way of damage, the difference between the price paid by him and the real value of the property which he has acquired. This I regard as the general and well established rule.

But the present case has peculiar characteristics which seem to require a modification of the ordinary rule by which damages are measured in cases of fraudulent sales. The plaintiff, in this instance, by reason of the fault of this defendant, became something more than a mere purchaser of real estate. By the fraudulent practice of the defendant the plaintiff was induced to embark in a speculation. He did not take title to the land; that was placed in the defendant, in trust for the plaintiff and the other associates. The original understanding was, that the land was to be held and improved, and a company was to be formed. The land was retained, except a small portion, sold with assent of all the parties, officers appointed, and expenses incurred. These steps were all taken in conformity with the scheme of proceeding adopted by the parties in the inception of the business. Starting, then, from the position that the jury, on the trial of this cause, have found the fact that the plaintiff was induced to enter into this speculation by the falsehood of the defendant, it seems to me clear that in conformity to well settled legal rules we must hold the defendant answerable for the loss of the moneys which the plaintiff, without fault on his part, lost in this speculation.

The rule to be applied in cases of this character is, that the defendant is responsible for those results, injurious to the plaintiff, which must be presumed to have been within his contemplation at the time of the commission of the fraud. When the defendant unlawfully enticed the plaintiff into his speculation, he was aware that the plaintiff would put at risk such sums as he might commit to the venture. With this knowledge, by false pretenses, he drew the plaintiff in. On what principle is it, then, that the wrongdoer is not to be made

to answer for the loss which he must have foreseen as probable, and which would not have happened without his fault? I think, clearly, these damages are not too remote. They would be embraced even within the rule by which damages are admeasured in cases of contracts. This latter rule is thus carefully defined in *Hadley v. Baxendale*, 9 Exch. 341, viz.: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach, should be such as may fairly be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." This case is the leading one on the subject, and, in a series of recent decisions, has been sanctioned and followed: *Woodyer v. G. W. R. Co.*, L. R., 2 C. P. 318; *Mullett v. Mason*, L. R., 1 C. P. 559; *Cary v. Thames Iron Works*, L. R., 3 Q. B. 181; L. R., 6 Eq. C. 405; *Portman v. Middleton*, 4 C. B. (N. S.) 322; *Bramley v. Chesterton*, 2 Id. 592; *Hamilton v. McPherson*, 28 N. Y. 76; *Griffin v. Colver*, 16 N. Y. 494; *Abbott v. Gatch*, 13 Md. 314.

The rule which these authorities recommend is one of much practical importance, for, as it seems to me, it will, if adopted, materially aid in the application of the abstract principles of the law on this subject to the facts of ordinary litigations. For example, Mr. Greenleaf says: "The damage to be recovered must always be the *natural* and *proximate* consequence of the act complained of." This is the usual statement of the rule, but the difficulty has been to apply this general proposition to the particular case; for in any attempt to examine the causes in connection with their effects, it will be soon apparent that some criterion is necessary by which to decide what result is proximate and what remote, in a legal sense, to the given act. The standard set up by the decisions above cited, supplies to a reasonable degree this deficiency. The test is, that those results are proximate which the wrongdoer from his position must have contemplated as the probable consequence of his fraud or breach of contract. Thus, to use an illustration of the civilians, if one should sell timber which should be used to

prop up a building, and, by reason of imperfection in such timber, the building should fall and be destroyed, the seller, even though he acted fraudulently in the sale, would not be liable beyond the difference in value between good timber and that sold. Under these circumstances the falling of the building would be regarded in law as a consequence too remote. But if, on the other hand, the timber was sold by a carpenter for the express purpose of propping up such building, then he would be answerable for all the damage to the building resulting from his deceitful representations. The ground of these opposite results is, that in the former case the falling of the building would be held too remote, as a consequence of the fraud, because such consequence could not be supposed to have been within the contemplation of the wrongdoer; and that in the latter case, the same casualty would be deemed a consequence proximate to the fraud, from the fact that he must be presumed to have regarded such an event likely to follow the act which he did. The rule thus indicated, although it may not be always easy of application to the endless variety of affairs which are constantly being presented for judicial cognizance, appears to be the most eligible which has heretofore been suggested.

Regarding, then, this as the correct principle, I think the judge's charge upon this topic in the present case was in all respects unobjectionable. He stated that "the proper measure of damages was the entire loss sustained by the plaintiff in this transaction, into which he was inveigled by the fraud of the defendant." Such an instruction was in complete conformity with the rule above stated, and, indeed, was but a submission to the ruling of this court in the unreported case of *Littell v. Manning*. It is to be borne in mind that the fraud complained of consisted in a false statement, which involved a fact which was much more apt to delude the plaintiff than the simple representation of the original cost of the premises. I consider the probable cause of the plaintiff's accession to the speculation in question was the assurance received by him that he was to be put on the same footing with the defendant. The plaintiff appears to have had confidence in the defendants; nothing, therefore, was more likely to attract him to the scheme than the persuasion that his own risk was no greater than that

of his companion. But this was a pure delusion, for the plaintiff risked the whole of his original investment, while the defendant took his share, free of all expense. By force of this deceit the plaintiff became one of the associates in the enterprise, and under its influence he not only paid his *quota* of the original pretended price of the lands, but made his subsequent advance. These outlays were the natural results of the defendant's fraud, and consequently, in accordance with the legal rule already propounded, he should be compelled to reimburse them to the plaintiff.

But upon the argument another point was taken by the plaintiff in error. It was insisted that the value of the interest of the plaintiff in the lands which remain unsold should have entered into the estimate of damages made by the jury. I am inclined to think this matter was not mooted at the trial, for the probability is that this land is possessed of a mere nominal value, and it thus escaped the attention of the counsel, jury and court. There was no proof as to its value at the time of the trial, but, as it cost originally at least ten thousand dollars, we can not, in the absence of all evidence, say that it is worthless. The plaintiff still owns in equity at least one eighth of this property. It can not be denied, therefore, that to the extent of the value of such share the verdict is in excess of what is justly due him. I think, then, it was an error in the charge to the jury not to embrace this subject. As I have already remarked, there is just ground for the belief that the attention of the court was not called to this subject; but the difficulty is that the judge has signed a bill of exceptions containing a general allegation that the charge on the point of the measure of damages was erroneous. Such a bill ought not to be allowed, for, as has been repeatedly said by this court, exceptions to be legal must be specific. But as the bill in this case comes before us in this general form, this court has no power to limit the range of objections.

In my opinion, the value of the plaintiff's interest in the land referred to was an essential element in a legal ascertainment of the damages in this case; and as such interest was not included in the scheme for the estimation of damages given by the court to the jury, on this account I think there was error, and consequently the judgment should be reversed.

The Chancellor (ZABRISKIE).

The action was for damages sustained by the false and fraudulent representations made by Binninger, the defendant below, to Crater, as to certain lands, upon the sale of an interest in them to Crater. The false representation relied on was as to the cost. The lands contained petroleum wells, and Binninger proposed to Crater to sell him one eighth interest in the purchase at twenty-eight thousand dollars, the value of the lands, and four thousand dollars for improvements to be put upon them; he represented that twenty-eight thousand dollars was the original cost of the lands to him, and that he was willing, as a favor to Crater, who was an old friend, to let him in the undertaking at the cost price. Crater, who knew nothing of the lands, but had confidence in the integrity and judgment of Binninger, and was willing to embark in the undertaking with him at the cost price, purchased the share at four thousand dollars, and the lands were conveyed to trustees for the use of those who engaged in the enterprise. Crater would not have engaged in it if he had not believed that this was the cost of the lands, and that he was going in at the original cost. The actual cost of the lands to Binninger was only about eighteen thousand dollars, and this was known to Binninger at the time he made the representations. Crater afterward paid five hundred dollars to the trustees for improvements to be made on the property, which were assessed alike upon all those interested; he paid this, after he had learned that the real cost of the property was eighteen thousand dollars, and not twenty-eight thousand dollars, as represented to him by Binninger. The trustees sold part of the property for sixteen thousand dollars; the residue remains, for anything that appears, in the hands of the trustees.

On the trial at the circuit, the judge charged the jury that they must assess the damages of the plaintiff below at the whole loss which he sustained in the transaction into which he had been inveigled by the fraud of the defendant, and that the basis of their verdict must be the four thousand dollars originally paid by him, deducting two thousand dollars, his share of the price of the part sold, and adding the five hundred dollars paid by him as an assessment, with interest properly calculated on these amounts.

Exceptions were taken to this charge as to the damages.

Upon these principles adopted by the circuit judge, the directions were wrong. If the true rule was the whole damages sustained by the plaintiff below, he should have directed allowance to have been made for the value of the property yet remaining in the hands of the trustees for the benefit of Crater.

The verdict or judgment in this case will not deprive him of the right to his share of the proceeds of that part, whatever they may be.

But I think the rule laid down, although the proper rule in some cases, is not the rule to be applied in this case. The proper rule upon principles of equity and justice to be applied in all cases of fraudulent misrepresentations in sales, is to assess damages to the amount of the loss that was occasioned by the misrepresentations. In some cases these are the same as the loss in the whole transaction, in others not. They may be less or greater. They may be serious in amount when the whole transaction proves profitable; they may be slight when the loss in the operation is great.

If a vendor represents that the assessments on lots sold are all paid, and the representation is false, the purchaser can recover if the assessments are but five hundred dollars, and he makes a profit of five thousand dollars on the transaction. But can only recover five hundred dollars if he loses five thousand dollars on the transaction. The true rule is the loss occasioned by the fraud and falsehood. This is the rule laid down by the Supreme Court of New York, in an able opinion by Justice Cowen, in *Cary v. Gruman*, 4 Hill, 627, and in the opinion of Justice Bronson, in *Van Epps v. Harrison*, 5 Hill. 63, and by the Supreme Court of Massachusetts, in *Medbury v. Watson*, 6 Met. 257.

The rule laid down in many cases of sale, that the damages should be the difference in the value of the thing sold as it was represented to be, and the value as it really was at the sale, is upon this principle: *Stiles v. White*, 11 Metc. 358. But that rule will not apply here, nor in many other cases. In this case the lands were just as valuable if Binninger only paid for them the price he did pay, as if he had paid the price he alleged he had paid. The principle is the same in all cases,

but the rule or manner of applying it must differ with the circumstances of each case.

In this case, Crater was willing to go in with Binninger at the cost price. Had Binninger told him truly that the cost price was eighteen thousand dollars, he would no doubt have been willing to go in at that price, and would have paid at that rate, and if any subsequent loss was sustained, would have had no claim against Binninger; and the true measure of damages appears to me to be the excess which he was induced to pay by the false and fraudulent representation of Binninger. If that was the difference between eighteen thousand dollars and twenty-eight thousand dollars, the one eighth would be one thousand two hundred and fifty dollars, which, with the interest, would be the real damage. And the plaintiff below would be entitled to recover these damages, although he had made double the amount out of the enterprise as clear profit. If, however, the jury should believe that Crater, if he had been told the real price, would not have entered into the transaction at that price, but would have taken a share in the lands only at the higher price, then his embarking in the transaction at all was the result of the fraud of Binninger, and the rule of the judge at the trial was the correct one; but it should have been so stated to the jury.

For these reasons the judgment should be reversed, and the record remitted, that a *venire de novo* may issue.

For reversal: THE CHANCELLOR, CHIEF JUSTICE, BEDLE, DALRIMPLE, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, OGDEN, OLDEN, WALES—11.

For affirmance: KENNEDY—1.

GILMORE V. HUNT'S ADMINISTRATOR.

(66 Pennsylvania State, 321. Supreme Court, 1870.)

Leaving the law to the jury. An instruction to the jury that they may "assess such damages as the evidence would warrant," without giving them any rule or standard, is not a mere omission, but a misdirection.

¹ **Vendee kept out of possession; mesne profits, the measure.** Gilmore agreed to convey coal land to Hunt, part of the consideration to be paid in notes. In suit on the notes, Hunt gave evidence by way of set-off, that Gilmore refused to give possession, and he had to obtain it by ejectment: *Held*, that the measure of damages on the set-off was the amount of rent or profit which Hunt would have derived from the land while wrongfully kept out of the same, i. e. the mesne profits.

Disregard of instructions as to measure of damages. The court should hold the jury to the strict rule as to the measure of damages with a firm hand, by setting aside the verdict whenever they disregard it.

Error to the District Court of Allegheny County.

Assumpsit to April term, 1854, by John Gilmore against David Hunt on three promissory notes. The defendant pleaded, by way of set-off, that the notes had been given as the consideration of an agreement that the plaintiff should convey to the defendant his undivided moiety of a tract of coal land, with the appliances for working, etc., of which the parties were joint owners, and that the plaintiff had refused to give possession, and to comply with the contract, etc.

The case was tried December 3, 1855, before HAMPTON, P. J.

The plaintiff gave in evidence, as his claim, three notes from defendant to him, dated February 11, 1848, each for \$183.33, and payable respectively in two, four and six months.

The defendant gave in evidence an agreement, made the 21st day of January, 1848, between Hunt and Gilmore:

"That whereas, the said parties are tenants in common of a certain tract of land, etc., on which there is a coal bank now in operation, with a railway and sundry buildings erected thereon, etc.

"Whereas, also, in the course of their business sundry debts have been contracted, for which judgment has been obtained, and upon execution thereupon, inquisition has been held this

¹ *Alexander v. Bishop*, 59 Iowa, 572.

day, by the sheriff of Westmoreland county, and the said property has been extended to pay the debts in seven years; whereas, also, it is believed by the said parties that it is their mutual interest to dissolve the partnership, and that the said coal bank, land and concerns generally, should be concentrated in one of them, for the purpose of making the best avail of the property for the payment of the said debts, by the said party of the second part taking the whole into his hands, under the extent as allowed by law, and discharging the said liens in the order of priority, according to the appraisement of the jury and the law. Now, therefore, it is agreed that the said John Gilmore doth hereby agree to sell to the said David Hunt all his title, interest and claim in the said land, coal bank, railway, carts, ropes and two flats, and other property on the premises, etc., the said property to be now in the possession of said Hunt, and all the accounts and debts due the said firm to be collected for his sole benefit. In consideration of the interest of the said Gilmore in the said land, etc., Hunt agrees to pay Gilmore \$650, viz., \$100 on the 28th of the present month, and the balance in three equal installments, at two, four and six months, for which he is to give three notes with interest. Hunt also agrees to take the whole property at the appraisement of the jury under the extent, and pay the liens in the order of priority, so far as judgment now exists, and also to pay all the other debts of the late firm as he may be legally required, or otherwise as he may arrange to the satisfaction of the creditors, so as to keep Gilmore fully clear and indemnified from every claim against the late firm, etc., it being the meaning of the parties that upon the payment of the \$650, Hunt is to be the sole owner of the said property, etc., and alone liable for the payment of all the debts, etc. * * * Gilmore agrees to make a deed for Hunt for his right, interest and claim in said property, upon the payment of the \$650."

There were other stipulations not necessary to notice. The first payment of \$100 was made by Hunt according to the agreement.

The defendant then offered the record of an ejectment brought by Hunt against Gilmore, to February term, 1849, for the premises and recovery by him, for the purpose of showing that Gilmore had violated his part of the agreement of Janu-

ary 21, 1848, in not delivering him possession. The plaintiff objected to the offer; it was admitted and a bill of exceptions sealed.

The defendant then called Kinney Goff, who testified that he and Hunt made an agreement as to the land and works, by which Goff was to take out coal at the rate of one quarter of a cent per bushel until it amounted to \$1,000; that he had been prepared to go on, but Gilmore refused to give him possession; the agreement fell through on that account; both Gilmore and Hunt had agreed to the arrangement. He also gave in evidence the record of the executions, under which the land was extended; Hunt's notice that he would retain the land; failure to pay second installment of rent, and sale of the property, August 7, 1849.

The plaintiff submitted two points; the 2d was:

"The presumption of law from the record of the action of ejectment in evidence is, that defendant received all damages for the detention of the possession of the premises, from the commencement of the action to December 12, 1849, date of trial, and the jury should exclude all damages for the detention of the premises prior to that date, and defendant's remedy, if any, is an action for the mesne profits."

The court answered both the plaintiff's points in the negative, and instructed the jury that by the terms of the agreement of 21st January, 1848, Hunt was entitled to the exclusive possession of the premises, except so far as is therein specially provided in relation to the privileges of Gilmore to load two boats, etc. "[And if the jury find from the evidence that Gilmore violated his part of the agreement, by refusing to allow Hunt such possession, they might assess such damages as the evidence would warrant.] For such violation, and if the same exceed the amount of the notes, they might certify the balance in favor of the defendant; if less than the amount of the notes, then the plaintiff would be entitled to receive the balance due on the notes."

The jury found for the defendant, \$450. The court overruled a motion for a new trial, but directed the judgment to be entered generally for the defendant January 5, 1856.

On the 24th of August, 1868, the death of the defendant was suggested, and Robert S. Hunt, his administrator, substituted.

Same day judgment was entered on the verdict.

The defendant took out a writ of error ; the judgment was reversed by the Supreme Court (9 P. F. Smith, 450), and judgment directed to be entered on the verdict for the defendant for \$450, with interest from December 3, 1855.

The plaintiff then took a writ of error, and assigned for error, rejecting his offer of evidence, denying his 2d point and the part of the charge in brackets.

J. MELLON, for plaintiff in error.

J. M. KENNEDY, for defendant in error.

The opinion of the court was delivered January 3, 1871, by WILLIAMS, J.

This record was brought before us two years ago by the defendant, for the correction of the error of the court below, in not entering judgment in favor of his intestate for the amount found to be due him by the jury, under his plea of set-off, and the judgment was reversed by this court, and entered for the defendant on the verdict in accordance with the finding of the jury. The case is reported in 9 P. F. Smith, 450. It is now brought by the plaintiff for the correction of alleged errors committed in the trial, before the finding of the verdict. The plaintiff and the defendant's intestate, who was living at the time of the trial, were the owners of a tract of coal land in Westmoreland county, on which there was an open mine, which they had worked in partnership, but having become involved, the plaintiff sold out his interest in the coal property, subject to the payment of the judgments and other debts of the firm, to the defendant for the sum of \$650—\$100 payable in seven days, and the balance, \$550, in three equal installments, for which the notes in suit were given at two, four and six months, each for the sum of \$183.33.

On the trial, the defendant set up as a defense, under his plea of set-off, the refusal of the plaintiff to give him possession of the property in accordance with the terms of his agreement, and gave in evidence the record of an ejectment which he brought against the plaintiff, in the Common Pleas of

Westmoreland County, to February term, 1849, for the recovery of the possession of said property, in which a verdict and judgment were rendered in his favor and showed, by the testimony of Kinney Goff, that he had made an agreement with the defendant to take out coal sufficient to pay \$1,000, at one fourth of a cent a bushel; that he was ready and prepared to go on with the contract, but that it fell through in consequence of the refusal of the plaintiff to let him have possession of the property.

The jury, under the instructions of the court, found a verdict for the defendant, and returned a certificate in his favor for the sum of \$450. The consequence of this finding is that the defendant gets the plaintiff's half of the property for nothing, and the sum of \$450 as damages because he did not obtain possession of it a year or two sooner. This result, however wrong if occasioned by the error of the jury, we have no power to correct; but if it was occasioned, as alleged, by the error of the court, in the instructions given to the jury as to the measure of damages for the plaintiff's refusal to deliver possession of the property to the defendant, then it is our duty to correct it. The court charged that "if the jury find from the evidence that Gilmore violated his part of the agreement by refusing to allow Hunt such possession, they might assess such damages as the evidence would warrant." This was leaving the jury to find such damages as they thought proper, without giving them any rule or standard for their guidance. It was not a mere omission, but a misdirection; and the result, as shown by their verdict, was that they ran wild in their finding. They allowed the defendant, as damages, the \$1,000 which Kinney Goff had agreed to pay him for the privilege of taking out 400,000 bushels of coal at one fourth of a cent per bushel, without a particle of evidence that the defendant had paid him any damages for the breach of the contract in not being able to deliver him possession of the mine, and without any evidence that the coal remaining in the mine, as it did, was worth any less at the time of the trial than the price which Goff had agreed to pay for it. The court, instead of leaving the damages to the discretion or caprice of the jury, should have instructed them as to the proper rule or measure of damages for the breach of a contract, such as this,

for the sale and delivery of a possession of real estate ; and the measure which the jury would in law have been bound to apply, would be the amount of rent or profit that the defendant might have derived from the property from the time when possession ought to have been delivered to him under the contract and the time when it was obtained under the action of ejectment ; in other words, the mesne profits during the interval. The court should hold the jury to the strict legal rule or measure of damages with a firm hand, by setting the verdict aside and granting a new trial whenever the jury palpably disregard or transcend the rule by their finding.

The other assignments of error are not sustained, and there is nothing in them requiring discussion. But for the error of the court in not instructing the jury as to the proper measure of damages for the plaintiff's breach of the agreement, in refusing to deliver possession of the property, the judgment must be reversed.

Judgment reversed, and a venire facias de novo awarded.

THE YOUGHIOGHENY IRON AND COAL CO. v. SMITH.

(66 Pennsylvania State, 340. Supreme Court, 1870.)

¹ **Contract by agent, not disclosing his principal.** If an agent make a contract in his own name without disclosing his principal, the principal, even if unknown to the contractor, is bound and liable for damages on a breach.

Idem. By contracting in his own name the agent only adds his personal obligation to that of his principal.

Delivery of iron inferior to contract. Iron having been delivered under a contract, the vendor was notified that it was inferior and requested to take it away, which he neglected to do. The vendee had then the right to dispose of it or use it, and the vendor was entitled only to its actual market value.

² **Idem—Measure of damages.** The measure of damages to the vendee to whom an inferior article has been delivered, when he retains the article, is the difference between the value of the article and what a good article could be obtained for.

¹ *Gear v. Shaw*, 7 M. R. 643; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. R. 51.

² *Camden Oil Co. v. Schlens*, 59 Md. 31; 43 Am. R. 537.

Error to the District Court of Allegheny County.

This was an action of assumpsit by William Smith against The Youghiogheny Iron and Coal Company, for failure to deliver iron under the contract hereafter mentioned. The plaintiff's evidence was, that in June, 1867, the defendants made two contracts to deliver to him good, gray, soft Youghiogheny iron; one contract was for 100 tons, the other for 400 tons, the president of the company, Mr. Wickersham, promising to haul it at once. The plaintiff gave his notes for the iron at four, five and six months. A third contract was made in August with Mr. Wickersham for 500 tons more of the same kind of iron as the former, to be delivered as fast as the plaintiff should require it. Three notes were given for this iron at four, five and six months. The iron was not delivered in season, and in consequence the notes had to be renewed, Mr. Wickersham promising to pay the discount, amounting to \$500.14. The iron delivered on the last contract was of very inferior quality; the plaintiff had to go into the market to obtain other iron to supply its place, and sustained "a severe loss." The iron was shown to Wickersham. He said the iron was not good, "the company would make it all right, Mr. Smith should not lose by it;" he told the plaintiff to lay the inferior iron by. He took a few loads back. The notes were, at Wickersham's request, made to him instead of the company. They had been paid by the plaintiff.

The defendant gave evidence that the company's iron was sent to Wickersham to sell on commission, which was paid him in addition to his salary; orders were never received at the furnace; its product was sent to him and he sold it; he was financial agent of the company; he collected the money for iron sold, and applied it to the liabilities of the company.

The defendant's points and their answers were:

1. "The plaintiff, having brought an action of assumpsit, and having neither alleged nor proved a warranty, can not recover in this action without returning, or offering to return the iron; and if the jury believe from the evidence that the plaintiff, notwithstanding his dissatisfaction with the quality of the iron, finally concluded to retain and use the same, he is precluded in law from subsequently recovering damages for an alleged defect in quality."

2. "The evidence of R. H. Smith, one of the plaintiff's witnesses, that Wickersham, the president of the company, told the plaintiff to put the defective iron aside, and that the company would act so that the plaintiff would suffer no damage, will not enable the plaintiff to maintain this action, unless the jury are satisfied from the evidence that the plaintiff closed with the proposition, and actually put the objectionable iron aside for the defendants; but if the jury believe that the plaintiff did not accept or rely upon the said proposition, but, from fear of the company's solvency, or for any reason that seemed good to him, elected to retain and use the iron, he can not now complain and recover damages, but the verdict should be for the defendant."

Answer to 1st and 2d points: "If you believe from the evidence that Wickersham agreed, in consideration that the plaintiff would give him his negotiable notes in advance, to deliver to him 500 tons of 'good, gray, soft Youghioghenny iron,' as fast as it could be manufactured at the furnace, and if the plaintiff then gave his notes, which were discounted immediately, and the proceeds received by the defendant; and if, when the iron came to be manufactured and delivered, it was found not to be 'good, gray, soft Youghioghenny iron,' but a white iron, made of cinders, and of a very inferior quality—so much so that it could not be used by the plaintiff in carrying on the kind of business for which it was purchased; and if he frequently notified defendant of these facts, and requested him to take the iron away; and if the defendant did not do so, but requested the plaintiff to let it remain on his premises, and promised that he would make it all right with him, so that he should lose nothing by it; and if the iron was left there under these promises, and the defendant neglected either to take it away, or to supply its place with such iron as he had contracted to deliver, for an unreasonable time; and if the plaintiff was compelled to go into the market and buy iron in its place, to enable him to carry on his works—then, when the plaintiff, as in this case, has paid in advance, he may, in order to secure himself as far as he can, use the metal for such purpose as he may think proper, and bring suit against the defendant for the difference between what this white iron was worth in the market, and what he was obliged to pay for iron to supply its place."

4. "If the jury believe, from all the evidence in the case, that the contract was made with Wickersham as an individual, and that the plaintiff, at the time of the contract, looked only to Mr. Wickersham as the party with whom plaintiff dealt, plaintiff can not maintain an action against defendant, but his remedy is against Wickersham alone."

Answer: "We may as well first dispose of the question raised by defendant's 4th point, as to whether this action can be maintained against the defendant. There is no conflicting testimony on this question. Taking all the testimony to be true, the jury will be warranted in coming to the conclusion that Mr. Wickersham had power to make this contract for the company, and that it was binding on it, and therefore as far as this question is concerned, the plaintiff is entitled to the verdict."

The court (HAMPTON, P. J.) further instructed the jury:

"You may find for the plaintiff the difference between the true market value of the 300 tons of white iron and the true market value of the same amount of 'good, gray, soft iron,' if the plaintiff was obliged to pay that much to supply the place of the other, with interest."

The verdict was for the plaintiff for \$3,209.

The defendants took a writ of error and assigned for error the answers to their points and the part of the charge given above.

G. SHIRAS, Jr., for plaintiffs in error.

A. M. BROWN, for defendant in error.

The opinion of the court was delivered January 3, 1871, by SHARSWOOD, J.

It will not be necessary to discuss the several errors assigned separately, as the principles involved in them may be stated and disposed of more briefly in a different order.

It may certainly be now regarded as a point settled, beyond all possible controversy, that if an agent, duly authorized, makes a contract in his own name, without disclosing his principal, and even when such principal is entirely unknown to

the other contracting party, he is nevertheless bound, and damages may be recovered of him in an action for its breach. By contracting in his own name, the agent only adds his personal obligation to that of the person who employs him: 2 Kent's Com. 631 and note. The learned judge below was, therefore, perfectly right in treating the question presented to him, of the liability of the defendants on the contract of Wickersham, as one merely of power, and in submitting to the jury as the only question whether he was duly authorized to make the contract in question for the sale of their iron. That the notes for the price were drawn to Wickersham's order, and that a bill for the damages was afterward rendered by the plaintiff to him, and in his name alone, were facts altogether immaterial; nor would it help the plaintiffs in error on another trial, if they should prove by Wickersham that the company had nothing to do with the contract or with the promissory notes, if the fact remains as established by this verdict, that Wickersham was their agent, with full power to make the contract for the breach of which the action was brought.

As to the question whether, when a manufacturer undertakes to make and deliver an article of a designated quality, and in fact delivers one of an inferior kind, the vendee is bound to return it, and can not keep it and resort to an action for damages, which has been so elaborately argued on both sides, it does not arise on this record, and we are not called upon to decide it. The learned judge below, in the manner in which he submitted the case to the jury, substantially ruled that point in favor of the plaintiffs in error, and they have, therefore, no reason to find fault with the charge. He put the case to them exclusively upon the fact of a special agreement between the parties, and it is not alleged or pretended that there was not evidence in the cause to justify such submission. If the jury believed that the vendee notified the agent of the vendors of the bad quality of the iron delivered, and requested him to take it away—if the agent did not do so, but requested the vendee to let it remain on his premises, and promised that he would make it all right with him, so that he should lose nothing by it—surely these facts dispensed with any return of the iron, and made the vendors responsible for the damage sustained by their breach of contract in delivering

an article of an inferior quality to that which they had contracted to deliver. After such a tender and refusal, it was not the duty of the vendee to keep the iron on hand, especially as it was a cumbersome article, to wait the good pleasure of the vendors, but he could dispose of or use it, and all that the vendors could in reason ask would be a credit for its actual market value.

The rule laid down by the learned judge for the measure of damages was undoubtedly right and perfectly accurate. If the jury found from the evidence the facts submitted to them, the plaintiff was entitled to recover the difference between what the inferior article was worth in the market and what he was obliged to pay for good iron to supply its place. And as the iron contracted for was to have been delivered before the maturity of the notes given for it, it certainly can not be questioned that if these notes were renewed at the request of Wickersham, with whom, according to the theory of the plaintiffs in error, the vendee was dealing as the agent of an undisclosed and unknown principal, and he specially promised to pay the discount upon their renewal, the plaintiff would have an undoubted right also to recover the money so paid with interest.

Thus the defendant's points were all substantially answered in the charge, and in a manner of which he has no just cause to complain.

Judgment affirmed.

CHAMBERLAIN V. PARKER.

(45 New York, 569. Court of Appeals, 1871.)

¹ **Breach of contract of lessee to sink oil well.** C. leased to P. certain oil lands, reserving no rent and stating no term of demise. In the lease P. agreed to put down a well to the depth of six hundred feet, by a date named. Upon failure to perform, a right of re-entry was reserved to lessor. P. did not sink the well. Upon action to recover for the breach: *Held*, that under the lease, the well, if dug, would have been P.'s, and the product his; and that C. could only recover nominal damages for the breach, and not what it would cost to sink such a well.

¹ *Bell v. Truit*, 8 M. R. 649; *Pell v. Shearman*, 10 M. R. 89.

Idem—Accepting lease equivalent to execution. By accepting the lease, P. became bound to sink the well, though he had not signed the lease, and his omission to execute it under seal was of no importance.

Lease perpetual by implication. Oil lease in which lessee covenants to sink a well, in which lease no term was limited, *construed* as a perpetual grant of the well to lessee, if he completed it and kept the covenants of the demise.

Covenants construed as conditions. The right of re-entry being attached to covenants gives them the force of conditions.

Breach of useless contract. There may be a loss in a legal sense, sustained by a party for a breach of a contract, though its performance might have injured his property, as if he should contract for a useless structure on his own land.

Appeal from an order of the General Term of the Supreme Court, in the Eighth Judicial District, reversing the judgment entered on the verdict of a jury in favor of the plaintiff for \$2,700, and granting a new trial.

This was an action brought to recover damages for the breach of covenant to put down an oil well. On the 17th of February, 1865, Chamberlain and Knox leased to the defendant all of their right, title, interest and claim on lot twenty-six, Cornplanter Run, Venango county, Pennsylvania. The lease was signed by both parties, and contained the following clause :

“It is further expressly understood, that the party of the second part (defendant) is to put down a well to the depth of six hundred feet, by the first day of July next, unless detained by unavoidable accident, and to pay three dollars a cord for wood standing on the lot.”

The rent was reserved and no term of demise stated.

Chamberlain and Knox assigned all their interest in the lease and land before suit. Upon a failure of the lessee to perform, a right of re-entry was reserved to the lessors. The defendant did not sink the well, and this action was brought to recover damages for the breach. The lessee did not seal the instrument. The jury, under the direction of the court, found a verdict for what it would cost to bore such a well, \$2,700.

D. H. BOLLES, for the appellant.

ANGEL & FINCH, for the respondent.

ANDREWS, J.

The instrument of February 17, 1865, called a lease, conveyed to the defendant all the interest of Chamberlain and King in the premises described therein, and left in them no reservation but a right of entry merely, on breach of condition subsequent.

The defendant, by accepting the conveyance, became bound to perform the stipulation on his part recited therein, although he had not signed it, and the right of re-entry being attached to the covenants, gave them the force of conditions: Co. Litt., 217, n.; *Rawson v. Copland*, 2 Sand. Ch. 251; *Jackson v. McClallen*, 8 Cow. 295.

The instrument was signed and sealed by the grantors, and the omission of the defendant to execute it under seal was of no importance.

It is not denied that the defendant wholly failed to perform his agreement to sink a well on the demised premises, and he became by such default liable to an action for a breach of the agreement.

The only question in the case respecting the measure of damages was the amount which the plaintiff, as assignee of the grantor, was entitled to recover.

The learned judge before whom the case was tried, held that the measure of damages was the amount it would cost to sink a well on the premises to the stipulated depth, and the verdict was in accordance with the rule adopted by the court.

It is the general rule that in actions for a breach of a covenant or contract, the plaintiff is entitled to recover what he has lost by the default of the defendant.

The law seeks to give compensation and indemnity and nothing beyond it.

If there are some exceptions to this rule, it is not now material to notice them: Sedgwick on Damages, 204.

The measure of damages is to be sought in the contract made by the parties, and where the amount of compensation is not fixed by the contract, then the natural, approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of compensation.

Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff, if the contract is broken.

So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages, if the defendant omitted to perform the contract.

In these and like cases, it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant.

But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that performance would not have benefited but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for a breach of the contract, to show that the act to be done, or the erection to be made, would injure the land or impair its value.

The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value.

A man may do what he will with his own, having due regard to the rights of others; and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant, who has been so employed and paid for building it, to say that his own performance would not be beneficial to the plaintiff.

It is upon this general view of the subject that the ruling of the court on the trial is sought to be maintained. The point to be considered is, whether the plaintiff, in any sense, actual or legal, has lost by the default of the defendant a sum equal to the expense of digging the well. The lot embraced in the lease is located in the oil-producing district of Pennsylvania, and the references in it show that the object of the lessee in taking it was to develop the production of the oil which might be found thereon.

The contract on his part to dig the well, so far as appears in the case, if performed, could result in no benefit to the lessor, except in the possible contingency that after the well

was dug the default of the defendant in paying for the standing timber on the premises, according to his undertaking in the lease, might enable them to re-enter on the premises.

The whole production of the well, if oil should be found, would belong to the defendant for all time unless the possible ground of forfeiture should occur, just suggested. If this contingency happened, it might be delayed until the supply of oil in the well was exhausted and the possession of the well had become of no value. The loss or gain in sinking the well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity, from the prosecution of the work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damages, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery.

The defendant was not paid for digging a well for the plaintiff on his premises. The well, when dug, would be upon the land of the defendant, and its product would be his.

It is idle to say, and the law does not require it to be said, in face of the obvious truth, that the lessors have been damaged, to the extent of the cost of digging the well, by the defendant's default. Nor does the defendant gain any undue advantage. The lessor had the right to re-enter, upon the default of the defendant, and he was bound to pay for the wood according to the contract.

It is not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of covenant by lessor against lessee for non-repair of the demised premises, under an unexpired lease, the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case was erroneous: *Doe v. Rowlands*, 9 C. & P. 734; *Smith v. Post*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412; *Payne v. Haine*, 16 Id. 541.

The plaintiff was, upon the proof given, entitled to nominal damages only.

The order of the General Term should be affirmed, and judgment absolute must go for the defendant.

All the judges concurring, judgment accordingly.

BOWKER v. GOODWIN.

(7 Nevada 135. Supreme Court, 1871.)

No showing that statement contains all the evidence. If there is no showing that a statement on appeal contains all the evidence on any fact involved in the case, it will be concluded that every fact essential to make out the respondent's case was sufficiently proven.

Findings not preserved in record. Findings not embodied in a statement properly certified will not be considered on appeal.

One contract on two pieces of paper—Stamp. A promissory note and an agreement executed at the same time and relating to the same subject-matter, though on separate pieces of paper, constitute but one transaction, and they require only the necessary stamps for one contract, and both may be admitted in evidence, though all the stamps are on one of the pieces.

Conflict of evidence as to collateral facts. The rule that the findings of a *nisi prius* court will not be disturbed on appeal, where there is a conflict of evidence, applies also to collateral facts.

¹ **Shares in a ditch company can have no peculiar value,** considered with reference to the ownership of property covered by the ditch, beyond the purchasable value of such shares in the market.

² **Market value—Failure to deliver stock.** The measure of damages in cases where there is a conversion of, or failure to deliver, a certain number of shares of stock having no peculiar value, is their market value, either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances..

Appeal from the District Court of the Second Judicial District of Washoe County.

The facts are stated in the opinion.

WILLIAM WEBSTER, for appellant.

R. S. MESICK, for respondent.

By the Court, LEWIS, C. J.

¹ *Atkins v. Gamble*, 42 Cal. 86; *Post Stock*.

² *Laubach v. Laubach*, 10 M. R. 177; *Powell v. Jessopp*, 18 Com. B. 335.

There are many assignments of error relied on and argued by counsel for appellant in this court, which can not be considered, because not properly brought up. We have frequently held that no fact found by the court below will be reviewed here, unless it be shown by the statement on motion for new trial that all the evidence adduced to sustain it is embodied in the record, for *non constat* but there was ample proof in support of it. This rule has been frequently announced by the court, and uniformly followed from the time of its organization: *Sherwood v. Sissa*, 5 Nev. 349. There is no showing that the statement in this case contains all the evidence on any fact involved in the case; hence, by the rule just stated, we are bound to conclude that every fact essential to make out the respondent's case was sufficiently proven.

Again, it has been held that the findings of fact can only be brought into this court by embodying them in a statement properly certified: *Corbett v. Job*, 5 Nev. 201; *Imperial M. Co. v. Barstow*, Id. 252. The findings in this case are not so brought up, and therefore can not be considered.

This leaves nothing that can be inquired into except such questions as may arise on the judgment roll, and such rulings at the trial as were excepted to. It is not claimed that the former exhibits any error, and only two exceptions are now relied on, namely: that "the court erred in admitting the agreement, Exhibit D, in evidence; and secondly, in refusing to allow proof as to the value of the Truckee ditch stock in connection with the plaintiff's ranch."

To afford a full understanding of these points, it becomes necessary to state some of the facts detailed in the statement. It appears that the plaintiff, Bowker, had agreed to sell to the defendant a certain ranch, the payments to be made in installments at designated periods. Possession was delivered, and the defendant continued in the enjoyment of the premises for a year or two, and during that time purchased certain shares of stock in a concern known as the Truckee Ditch Company, organized for the purpose of conducting water from the Truckee river for the use of the farmers located in the vicinity of the ranch in question, and which was so situated that the water from it could be brought to the plaintiff's premises. The defendant having failed to make the payments for the

ranch in accordance with the agreement between himself and plaintiff, possession was surrendered, the contract of sale canceled, and in the settlement of the affairs between them the promissory note sued on was executed by the defendant. On the same day, as appears by its date, the plaintiff executed and delivered to the defendant the following instrument, to wit: "I hereby agree that whenever C. C. Goodwin transfers ninety odd shares of the Truckee Ditch Company stock, now standing in the name of L. P. Drexler, to me on the company's books, free from all charges, then I will surrender a certain note which I hold against him for the sum of eighteen hundred and sixty-six dollars, payable in legal tenders, or fourteen hundred dollars in gold. Said note is dated January 9, 1867. John S. Bowker."

After the plaintiff had closed his case, having introduced the promissory note with the necessary accompanying proofs, the defendant had occasion to offer, and did offer, in evidence, the agreement above set out; its admission was objected to on the sole ground that it was not stamped as required by the act of Congress and the revenue laws of this State. To this objection it was answered that the two instruments constituted but one agreement or contract; that they were executed at the same time, and consequently that they were but parts of one transaction and agreement. And this was sustained by the evidence of the defendant, who testified that "the note and agreement were made at the same time. Both papers were drawn up and laid on the table and signed together." It is admitted that the portion of the agreement which is sued on as a promissory note was properly stamped, sufficiently not only if the papers should be held to be an agreement, but even if a promissory note. The court below admitted the paper and the plaintiff excepted. Was the ruling correct? If the two instruments were executed together as one transaction, then upon every authority they constituted but one instrument or contract, although written on different pieces of paper. They would have to be taken and construed together as if written on the same paper and signed by both parties. The law in such case deals with the matter as it really was—as one transaction—and therefore all the papers drawn up simultaneously bearing on the same subject are held to be but one

contract, although written on several papers. If both papers constitute but one contract, then it is clear it was only necessary to use the stamps required for one contract.

There was a conflict of testimony as to whether the papers here in question were executed simultaneously, or constituted one transaction, it is true; but the court below deemed the evidence sufficient to warrant the conclusion that they should be taken as one contract, executed simultaneously, and consequently admitted the paper objected to. In such case, the conclusion attained by the court below can not be disturbed. The decision of the court at *nisi prius*, as to the sufficiency of proof upon any collateral fact like this, must be governed by the rule which prohibits the appellate court from setting aside a verdict or findings of fact, upon the ground of insufficiency of evidence, where there is a conflict. As, therefore, it can not be said the court was not warranted by the testimony in treating the two papers as one contract, evidencing one transaction, we must accept it as an established fact in the case; and as one of the papers was stamped, it must be held, as was done in the court below, that the portion of the contract objected to required no separate stamp for itself, and was consequently admissible.

So the ruling upon the other assignment which is to be noticed was likewise correct. The value of the ninety shares of Truckee Ditch Company stock could only be material, upon the assumption that the defendant was in some way bound either to deliver the stock to the plaintiff or liable for its value. Now it is very well settled that the measure of damage, in cases where there is a conversion of, or a failure to deliver, stock of this character according to contract, is its market value, either at the time of conversion, when it should have been delivered, or at the time of trial, according to circumstances: *O'Meara v. North American M. Co.*, 2 Nev. 123. In no case would its value, as connected with other property, or as modified by some peculiar circumstances, be the measure of damage. If the stock can be purchased in the market, that which was converted, or should have been delivered, may be replaced. It is not claimed here that the particular ninety shares of stock which the defendant agreed to deliver, had any peculiar value over any other ninety shares in the same com-

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pany. Why, then, should any sum be allowed as damages, beyond what may be sufficient to replace that which the defendant was called upon to deliver, or at least its market value at the time it should have been delivered. It can not be claimed that plaintiff was damaged beyond that, and the law does not pretend to do more than award full compensation for a breach of contract. If the defendant wishes to procure the stock, he might be allowed such damages as will enable him to purchase it, and there is no claim that any equal number of shares will not be equally valuable in connection with his ranch as those which the defendant contracted to deliver. The court below ruled correctly, then, in excluding evidence of the value of the stock, taken in connection with the ranch. These being the only errors which can be considered upon this record, the judgment below must be affirmed.

It is so ordered.

IN RE UNITED MERTHYR COLLIERIES CO.

(Law Reports, 15 Eq. 46. Before the Vice Chancellor, 1872.)

¹ **In absence of fraud, expenses allowed.** When coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud) will be treated as the purchaser at the pit's mouth and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing it and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal.

In this case an order was made on the 19th of December, 1871, upon the application of the Powell Duffryn Steam Coal Company, allowing their claim against the United Merthyr Collieries Company in liquidation "for such an amount as is equal to the value, according to the average price of steam coal from the Abergwawr pit in 1864 and 1865, at the pit's mouth, of 16,932 tons of coal, after deducting therefrom the actual cost of severing the said 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, such de-

¹ *Ege v. Kille*, 10 M. R. 212; *Clowser v. Joplin Co.*, 10 M. R. 222; *Wood v. Morewood*, 10 M. R. 77; *Jegon v. Virian*, 8 M. R. 628.

ductions to be settled by the judge in case the parties differ."

The coal in question had been wrongfully taken by the United Merthyr Company from the adjoining colliery of the Powell Duffryn Company by working beyond their boundary.

When the matter came on in December, 1871, upon the claim of the Powell Duffryn Company, as creditors under the winding up of the United Merthyr Company, for the value of the coal taken from within their boundary, his honor was of opinion that the case of trespass was clearly proved against the United Merthyr Collieries Company, but that as there was no suggestion of fraud it was a case for the application of the more lenient rule, and accordingly that they must pay the value of 16,932 tons of coal at the pit's mouth, deducting the cost of severance and the cost of carrying to the pit's mouth.

When the matter was before him in chambers, the chief clerk decided that, under the order, the United Merthyr Company were not entitled to any deductions beyond the bare expense of severing, banking and raising up, taking the words in their literal sense.

The liquidators of the United Merthyr Company now moved that the chief clerk might be directed in proceeding on the order of the 17th of December, 1871, and in ascertaining the actual cost of severing the 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, to include all the working expenses incurred by the United Merthyr Company

NOTE. SIR JAMES BACON, V. C.:

In cases of fraud, of course, there can be no doubt. In cases even partaking of fraud there can be no doubt. I am not quite sure that I understand what is meant by the learned judge who uses that word "negligence," (Baron Parke in *Wood v. Morewood*, 3 Q. B. 440, n.), nor to what extent that may be carried; but what weighs with me in this case is, that I find in the lord chancellor's observations (*Jegon v. Virian*, L. R. 6 Ch. 742), a strong disposition to apply what he calls the milder rule of law whenever it can possibly be done. Here there is no suggestion of fraud that I can attend to.

There has been no evidence relating to it, and it may have been a mere mistake. But what also weighs with me greatly is this: the claimants are themselves owners of mines. They seek their profit by severing the coal in the mine and bringing it to the surface and then selling it. If they had been undisturbed in the possession of which they now complain they must have incurred an expense in severing the coal before they could have made a profit. The mere disbursement, then, which has been made by the United

in bringing the coal to bank, including therein not only the money paid for cutting, banking and raising the said coal, but also the wages, cost of wear and tear, and consumption of material and stores, without which the coal could not have been brought to the pit's mouth, but not including any proportion of the expense of sinking the shaft, or any other capital expenditure, or any interest on capital expenditure.

Mr. EDDIS, Q. C., and Mr. A. DIXON, in support of the motion.

Mr. KAY, Q. C., Mr. CHARLES HALL and Mr. BIDDER, for the Powell Duffryn Company, were not called on.

SIR JAMES BACON, V. C.

I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me, especially in the more recent cases, because, as I recollect, there was want of exact agreement between some of the common law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed and the rule to be clearly and plainly established, and so understanding I made the order in this case. The words which are supposed to have been used are "actual cost and ex-

Merthyr Company in severing the coal is doing no wrong that I can see to the claimant; but I repeat that if there was the slightest color of fraud, or anything like unfair dealing in the matter, I should be disposed, notwithstanding the authorities I have referred to, to hold that the case came within the rule which enables the court to fix the largest amount of compensation. I regret that there is not a plainer rule upon the subject. It ought not to be left to the judgment of individual judges as to what is the rule to be applied to trespasses of this kind. Still, as I find the law in a certain state of confusion, and the more mitigated rule having been greatly favored, not only by the observations of the lord chancellor, but in the other case, *Wood v. Morewood*, 3 Q. B. 440, n., decided by the late Mr. Baron Parke, I think that the cost of merely severing—the actual disbursement—must be deducted from the sum which the claimants are entitled to. They could not have had the gain which they proposed to themselves unless they had undergone that expense. They get the value of their property with a deduction for that which, if the trespass had not been committed, they would have had to bear.

penses ;” the word that has been read from the shorthand notes is “disbursements.” In my opinion there is not the slightest doubt about the meaning of either of those expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit’s mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit’s mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit. Nor do “just allowances” mean profit; but if I were to change the words of the order, I might leave it doubtful or might open up some ground for argument as to what is meant by “just allowances.”

The order has been settled, not without the knowledge of both parties, and when I am asked to interpret the words of it, I have the means of doing so distinctly by reference to the shorthand notes in which the word “disbursements” occurs.

There can be no doubt as to what “the actual cost” means. The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit’s mouth. That must have been done, and could only have been done, by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal, and how much money he spent in bringing it to the pit’s mouth. My opinion is that the matter

is perfectly clear, and that I could not usefully or properly alter any one part of the order. Now I see no difficulty in working out the order. When the chief clerk has taken the account, if he takes it rightly, there is an end of it. If he takes it wrongly, and does not allow that which is just, the persons who have a right to complaint may then complain. At present I can not interfere in the slightest degree, although I do not hesitate to say now (nowwithstanding what has been said by Mr. Eddis) what I meant by the judgment I then pronounced, and what, in my opinion, is the meaning of the words used in the order.

His honor added that he had no reason to doubt that the Merthyr company, in the course of their working the mine, kept books of account, wages books and other books, and any person looking into those books could extract from them every farthing which had been spent (it was disbursement that he was speaking of) in working the coal. What was spent in bringing it to the pit's mouth, wages or whatever else it was, could by the same process be ascertained. He was satisfied that upon principle and in fact, there could be no difficulty in ascertaining what the plaintiff would have had to pay out of his pocket, if he had severed the coal and brought it to the pit's mouth, and that amount, whatever it was, the Merthyr company had a right to have deducted from the value of the coal at the pit's mouth, for which the company were made answerable to the plaintiff.

THE BARTON COAL CO. v. COX ET AL.

(39 Maryland, 1; 17 Amer. Rep. 525. Court of Appeals, 1873.)

¹**Injury to coal left standing.** In trespass for breaking and entering plaintiff's coal lands he is entitled to recover its worth per ton in its native bed for all such coal as defendants, by their acts, have rendered impossible of removal; and for coal which may be still won, but at greater expense on account of defendants' acts, he is entitled to recover what the evidence may show to be the depreciation in value of such coal.

¹**No deduction of expenses.** In trespass for coal mined and taken the proper estimate of damages is its value, after it is severed and before removal,

¹ *Franklin Co. v. McMillan*, 10 M. R. 224.

without deducting the expense of severance. If defendants knew that the land was not their own, exemplary damages are allowed.

Right of action passes to executor. Three tenants in common brought their action in trespass for mining and taking away coal, etc., on their lands. One of the plaintiffs died, having devised an estate for life to his wife in the lands in controversy. His executors were substituted in his place as parties: *Held*, that the joinder was right; that the action survived to the executors and not to the heir, and that the executors had a right to recover the entire damages, even if they amounted (being from destructive trespasses) to the full value of the fee in the lands.

Review of authorities. The English and American precedents reviewed, and *Martin v. Porter* (10 M. R. 74) followed.

Appeal from the Circuit Court for Washington County.

The action was trespass.

The jury rendered a verdict for the plaintiffs and assessed the damages at \$22,954.24. This amount being in excess of the damages claimed, a *remittitur* was entered by the plaintiffs for the excess, \$2,954.24, and judgment was rendered for \$20,000.

The opinion states the other material points in the case.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and ROBINSON, JJ.

J. H. GORDON and I. NEVETT STEEL, for appellant.

WILLIAM WALSH and WM. T. HAMILTON, for appellee.

BOWIE, J., delivered the opinion of the court.

It appears, from the record, that the suit in which this appeal is taken was instituted, originally, by John A. Smith, John S. Coombs and Edward Hoye, against the Barton Coal Company, the appellant.

The declaration was filed in the names of the co-plaintiffs, containing three counts, which, as far as the distinctive forms of action can be recognized in our present system of pleading, may be designated as trespass *quare clausum fregit*, *et de bonis asportatis* combined.

The first count is a general one, charging that the defendant broke and entered the *locus in quo*, and mined, dug, excavated and carried away large quantities of coal.

The second and third set out the trespasses with great minuteness, and charge that the defendants then and there raised large quantities of coal, iron ore, and other minerals, and then and there took, carried away and converted it to their own use. The defendants "pleaded" they did not commit the wrongs, etc., and "freehold in the defendants," on which pleas issues were joined, and a warrant of re-survey issued, executed and returned, showing no conflict of title or location, but that both parties located the several tracts, on which the trespass was complained of, in the same manner.

The cause having been removed, on the suggestion of the appellant, from the Circuit Court for Allegheny County to the Circuit Court for Washington County, on the 22d of July, 1872, the record was filed in the latter court, the death of John A. Smith suggested, and motion made for leave to make new parties by inserting the names of his executors, Walter S. Cox and Thos. C. Cox; which leave was granted on the 31st July, 1872, and new parties made.

The plaintiffs then filed their replication to the second plea of the defendant, viz.: "that the close in the declaration mentioned, was not the close of the defendant."

On the 19th November, 1872, the defendants filed their plea of *ne unques executor* which on motion of the plaintiffs was stricken out on the same day.

This action of the court below is made the first subject of objection, on the ground that the appellant had a right to know the recovery was by the proper parties, otherwise a second recovery might be had for the same cause of action, and the issue could only be made by plea. There is no doubt that the identity and verity of the representative character in which a suit is brought or maintained by a person claiming to be executor or administrator, must be established, in order to enable him to recover, as well as when a party sues individually. Whence, whenever a defendant has reason to doubt whether the plaintiff is the person he assumes to be, he may plead in abatement, *i. e.*, show cause, why he ought not to be impleaded in the manner and form he now is; these pleas, being dilatory, must be pleaded within a certain time prescribed by the court, and generally before a general impar-

lance or continuance; otherwise an infinite delay might ensue.

The third section of article 2 of Public General Laws, title, "Abatement," provides that if the plaintiff in any action shall die before judgment, his heir, executor, or other proper person to prosecute such action, may appear and prosecute the same, and such other proceedings shall be had to bring the cause fairly to trial as the court may deem proper.

It does not appear from the record, or agreement filed in the cause, whether any term intervened between the appearance of the executors, which was on the 31st of July, 1872, when they filed their replication, as of April court, 1872, and November term, 1872, when the appellants filed their plea of "*ne unques executor*;" but this court must presume the court below for some sufficient cause directed the plea to be stricken out, so great a lapse of time occurred between the appearance of the executors and the plea, and a continuance had. The proper time for such a plea was when the executors asked leave to appear, and the plea should have been entered at that term.

At the trial five bills of exceptions were taken by the appellants and three by the appellees, but no appeal being taken by the latter, these are not under consideration.

The first exception of the appellant was taken to the admission of certain certificates of letters testamentary to the executors, and in connection therewith, copies of the last will and testament of their testator and of probates of attesting witnesses thereto annexed, under the hand of the register of wills and seal of the Orphans' Court of Washington County, District of Columbia, and subscribed by the judge thereof, which were offered by the plaintiffs below to prove the representative character of the executors of Smith.

However informal and irregular these certificates may have been, and whatever error was committed by the court below in admitting them, that error was corrected and rendered harmless by the introduction, at a subsequent stage of the trial, of an exemplification of the letters testamentary, authenticated according to the testamentary system of this State: *vide* article 93, section 76 of the Code of Public General Laws.

The appellant's second bill of exceptions is taken to the rejection and exclusion, as evidence, of a letter offered by the

appellant, purporting to be signed by Dr. Samuel P. Smith, agent for Mrs. Sally Smith, dated the 5th of September, 1868, addressed to T. S. Cunningham, Esq.

We can not perceive any ground for questioning the propriety of the court's decision in this respect. The writer of the letter was himself before the court as a witness. He had testified that although he had acted as agent for John A. Smith in his lifetime, and for his widow and legatee, Mrs. Sally Smith, since his death, he had never been agent for Hoye and Coombs, or the executors of Smith. Under such circumstances, to have admitted the letter of one who was a stranger in interest to the parties to the cause, would have violated the elementary rules of evidence.

The third and fourth exceptions of the appellant are taken, to the exclusion of certain evidence offered by the appellant in mitigation of damages. The particular statement and account referred to in the third, having been lost, that item of evidence is necessarily disposed of, but the same principle is said to be involved in the fourth exception, in which the appellant offered to prove the costs, expenses and charges of removing the coals mined from the rooms in which the coal lay when first taken from the bed of the Barton coal mines, and the costs and expenses of removing it to the opening of the mines, and the ruling market value thereof, after being transported to market, and cost of such transportation. If this exception was interpreted literally, it would be sufficient to say that evidence of the value of coal in the Barton coal mines, and of the costs of removing thence to its opening and to market, was not evidence of the value of coal in the appellees' mines, and the costs of transportation to the opening and thence to market, and however close these mines may be in fact, that such evidence is not admissible, by comparison, when direct testimony might be procured; but the question really involved and intended to be presented is that submitted by the third prayer of the appellees, and which constitutes a part of the appellant's fifth exception, and which declares, if the jury find the facts mentioned in their first prayer, then they, the appellees, are entitled to recover such sum per ton as the jury may find the said coal so mined was worth when first severed from its native bed, and before it was put upon the

mine cars, without deducting the expense of severing said coal from its native bed. If the appellees were entitled to recover the price of the coal, as alleged in the third prayer, the evidence of the cost of severance and transportation, designed to be offered by the appellants in their fourth bill of exceptions, was impertinent, immaterial and inadmissible.

There are two standards, or measures of damages to property, the one the severe, the other the lenient, which, according to some of the authorities, depend upon the intention or *mala fides* of the defendant, and according to others, upon the form of the action.

This distinction is admitted in the very recent case of "*The United Merthyr Colliery Company ex parte The Powell Duffryn Steam Coal Company's Claims*," cited by the appellant from "The Weekly Reporter and Solicitors' Journal," December 7, 1872. This was a motion, made in behalf of the former company, for obtaining from the court the construction of an order made previously, by which the former company were ordered to pay the value of certain coal (obtained by them under a trespass) at the pit's mouth, deducting the cost of severance and the cost of carrying to the pit's mouth. The solicitors in support of the motion, arguing that just allowances of winning coal are deducted in cases of trespass when there has been no fraud, say, in such cases there is a severe rule and a lenient or mitigated rule.

The court, BACON, V. C., held, "the defendants here must be taken as purchasers; the plaintiffs, although they have suffered a wrong, must not have more of the benefit of that wrong than was actually the case. All just allowances must mean actual disbursements, but without profit. The plaintiffs must be in the same position as if they had severed the coal and brought it to the bank themselves, apart from any profit."

The circumstances of the case are not disclosed further than may be inferred from the observations of the counsel, and the language used by the court. The appellees' third prayer does not, it is said, advert to the distinction referred to in the above case, the existence of fraud or knowledge on the part of the defendant, as in the case of *Ridgley v. Bond and wife*, 17 Md. 14.

If this were an action of trover, the plaintiff, according to

the authorities, might recover the enhanced value, and is not confined to the value of the material, either at the place of taking or of manufacture: 2 Greenleaf Evid., Sec. 276; *Greenfield Bank v. Leavitt*, 17 Pick. 3; *Baker v. Wheeler*, 8 Wend. 505; *Rice v. Hollenbeck*, 19 Barb. 664.

Adverting to these or similar cases, Mayne, in his work on Damages, p. 289, says: "A curious question has been raised in America as to the value at which an article is to be estimated which has been changed into some new form by its wrongful taker. In New York it has been several times ruled that the whole value of the article in its new form may be recovered; as for instance, where timber had been converted into boards, wood into coal, black salts into pearl ashes." See cases cited, Sedgwick on Dam. 565, 4th Ed.

* * * "But this merely decides who shall have the property, not what amount of damage shall be received for the alteration." "It may be said that if the property of the improved article continues in the original owner, he must be paid for its detention on its full value; but I conceive that this by no means follows." Referring then to the English authorities, he proceeds:

"The only English authority, that I am aware of, which seems to oppose this view, is that of a class of cases in which the question has been as to the mode of valuing minerals wrongfully severed and carried away. The form of the action in the first three cases was trespass; and there it was held that the coal should not be estimated at its value as it lay in its bed, but at its price when it first became a chattel, and that no deduction could be made on account of the labor bestowed in digging it." Mayne on Dam., Tit. "Trover," 291. It would appear from these extracts there is a diversity between the American and English cases in applying the rule of damages, and the American cases themselves are far from being uniform.

The case of *Forsyth v. Wells*, 41 Pa. 291, was an action of trover, where the taking was by mistake, because of the uncertainty of boundaries; it is founded on Baron Parke's decision in *Wood v. Morewood*, 43 Eng. Com. Law, 810. It is conceded there are cases of trespass where the judges have adopted the mode of calculating damages for taking coal, sub-

stantially equivalent to the rule laid down by the common pleas in the judgment appealed from, where no willful wrong was done, and refers to *Martin v. Porter*, 5 Meeson & Welsby, 351, but prefers the rule in *Wood v. Morewood*.

Herdic v. Young, 55 Pa. State Rep. 176, was an action of replevin for logs, cut and carried down to a boom. It was held, where the injury was inadvertent, the measure of the damages would be the value of the logs in the boom, less the cost of cutting and hauling them to the river, and driving them to the boom.

The United States v. Magoon, 3 McLean, 171, was an action of trespass for digging and carrying away lead ore from the lands of the plaintiff. The defendant suffered a default and a jury were sworn to assess damages. The plaintiffs contended they were entitled to the value of the ore after it was dug, but the court instructed the jury, that was not to be the measure of damages, but the injury done to the soil by the trespass. That the digging and carrying away by the same persons is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil.

The case of *Goller v. Fett*, 30 Cal. 482, was an action for wrongfully removing the gold-bearing earth from a claim and extracting the gold. The value of the gold, less the expense of digging and separating it from the realty, so as to make it personal property, was held to be the measure of damages.

The case of *Coleman's Appeal*, 62 Pa. 278, was a bill for accounting between tenants in common. The court said: "The case of the defendants is entitled to still more favorable regard than that of a trespasser, though by mistake or ignorance. There the plaintiff's property has been taken wrongfully and against his will. Here a tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore in place is therefore the only just basis of account."

The case of *The Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, was a suit in equity for injury to plaintiff's land, by digging and excavating iron and other ores. The standard of damages was said to be the value of the ore as it lay in

the bed, but the point does not appear to have been discussed.

In the absence of any adjudication in this State on the question, and the conflict of authorities in others, we must endeavor to deduce the principles which should govern in cases of this peculiar character, from a condensed statement of a few of the leading cases in England, where this species of property has long been the basis of national wealth, and often the subject of judicial consideration.

Martin v. Porter, 5 Meeson & Welsby, 351, is a case very analogous to the present. That was an action of trespass for breaking and entering the plaintiff's close, and taking and carrying away coal, etc. The defendant was owner of the adjoining estate and had worked the coal under the plaintiff's land.

At the trial at York assizes, the question was, upon what principle the damages were to be assessed. Parke, Baron, was of opinion, "that the plaintiff would have been entitled in an action of trover, to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked it and brought it there; that not having made such a demand and the action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be its price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth," etc.

Leave was given to move to reduce the damages if the court in banc should be of opinion that the proper measure of damages was the value of the coal in the bed.

At the Easter term following, on motion to reduce the damages, before a full bench, it was argued that to allow any other estimate of damages (than the value in the bed) would be to confer on the plaintiff a large profit, in the absence of anything either done or suffered by him; that if he retained the amount given, on the principle laid down by the learned judge, he is paid not merely the value of the coal, but a double value. All the judges *seriatim* decided that the damages should not be reduced.

Parke, B., said: "The plaintiff is entitled to be placed in the same situation as if these coals had been chattels belonging to himself, which had been carried away by the defendant, and must be paid their value at the time they were begun to be taken away. He had a right to them without being subject to the expense of getting them, which was a wrongful act by the defendant, and for which the defendant can not claim to be reimbursed. I am not sorry this rule is adopted, as it will tend to prevent trespasses of this kind which are generally willful."

This case was decided in 1839, and was followed by Lord Denman, C. J., in *Morgan v. Powell*, 3 Adol. & El. N. S. 281, in 1842, which was also an action of trespass for the breaking of a mine, digging and carrying away coal; and by Parke, B. in *Wood v. Morewood*, Derby assizes, cited in 3 Q. B. 440, in which there was a count in trover. See also *Wild v. Holt*, 9 M. & W. 672, where the case of *Martin v. Porter* is again re-affirmed.

Wood v. Morewood was tried at Derby Summer Assizes, in 1841, before Baron Parke. The plaintiff claimed damages on the principle laid down in *Martin v. Porter*, 5 M. & W. 351, which amounted to £6,000. The defendant contended that the jury were the proper judges of damages, and that in this case there was no imputation of fraud or want of reasonable care or caution on the part of the defendant; they might assess the damages on the principle that the defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was at the expense of getting it.

Baron Parke told the jury, "that if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought that the defendant was not guilty of fraud or negligence, but acted honestly and fairly in the full belief he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiffs.

This case was followed by *Morgan v. Powell*, 3 Adol. & Ellis, N. S. 278, (43 Eng. Com. L. 734,) in 1842, an action of trespass for breaking, entering, taking and carrying away

coals, before Lord DENMAN, C. J., PATTESON, WILLIAMS and COLERIDGE, JJ., on a rule to show cause why the verdict should not be reduced by the amount of the expense of getting the coals and bringing them to the pit's mouth.

In the course of argument, reference was made to the principle of estimating damages laid down at *Nisi Prius*, by PARKE, B., in *Wood v. Morewood*.

LORD DENMAN: "We are of opinion that the rule in *Martin v. Porter* is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit; and the estimate of that loss depends on the value of the coal when severed; that is, the price at which the plaintiff could have sold it. This, plainly, was the value of the coal itself, at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal. Nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article, without being taken from the pit. Any one purchasing it there would, as of course, have deducted from the price, the cost of bringing it to the pit's mouth. Instances may easily be supposed where particular circumstances would vary this mode of calculating the damage, but none such appear here."

The amount of the verdict was ordered to be reduced by the cost of bringing it to the pit's mouth.

However inconsistent the allowance may be with the general principles announced, it is clear that *Martin v. Porter* was emphatically approved and affirmed, and *Wood v. Morewood*, although referred to in the argument, was not noticed in the decision.

Again in *Wild v. Holt*, 1842, before PARKE, B., ALDERSON, B., GURNEY, B., and ROLFE, B., in reply to the argument that the defendant was entitled to deduct the expense of getting the coal, etc., PARKE, B., said: "The case of *Martin v. Porter* establishes that, as against a wrongdoer, no such abatement ought to be made, but that the jury are at liberty to give as

damages the full value of the coals when they just exist as chattels in consequence of the trespass."

Referring to the rule laid down in *Martin v. Porter* again, he says, "which is a very salutary one, because the parties must know—at least they may know by proper dialing—that they are trespassing on their neighbor's property." 9 M. & W. 674.

The necessity and importance of this rule can scarcely be magnified in a community where the wealth of the country consists in its mineral deposits; and the facts developed in evidence show the agents of the appellants, at least, had the means of knowing, if not actual knowledge, of the lines of the corporation by which they were employed. It is impossible in cases of this kind to discriminate between natural and artificial persons, and the latter must be held responsible for the negligence and omissions of its employes, as well as their acts, in the discharge of duties confided to them.

The appellants' counsel, in their brief and argument, insist that the correct basis of the rule of damages is the principle of compensation; that the appellees' third prayer, without reference to surrounding circumstances, requires the jury to give, as damages, what the coal was worth after it was severed from its native bed, without deducting the expense of severing, which was punitive in its effect, "instead of being compensated and indemnified for the injury sustained, they were enabled to realize an enormous profit out of a trespass which, for anything that the third prayer required the jury to find, might have been committed by the defendant inadvertently, and in the honest belief that it was mining its own coal."

These arguments were used in the case of *Martin v. Porter*, though perhaps not so forcibly.

The measure of damages was defined in that case, without regard to circumstances of aggravation; the plaintiff was said to be entitled "*ex debito justitiæ*," to the value of the coal as a chattel, when the defendant began to take it away.

And the defendant had no right to be reimbursed for doing a wrongful act, a rule which was necessary to prevent trespasses which were generally willful.

We do not understand that the appellants contend that a different rule of damages prevails in trespass, *q. c. f.*, and

trover, or that any objection is made to the rulings in consequence of the form of the action.

Although such a distinction is adverted to in some of the authorities, it applies rather to the allowances to be made in consequence of the time and mode of the demand, than to any principle of right in adjusting the compensation; except where circumstances of aggravation are relied on in trespass.

Mayne, in his work on Damages, 290, states the rule as being the same in both forms of action.

The rule prescribed by the third prayer of the plaintiffs conforms in principle to that in *Martin v. Porter*, and the cases of *Morgan v. Powell*, and *Wild v. Holt*.

The appellees' fourth prayer differs from the third in asserting that knowledge on the part of the defendant that the "*locus in quo*" was not its own lands, at the time the trespasses were committed, entitled the plaintiffs to exemplary damages; the correctness of which is impliedly admitted by the appellants in their argument that this circumstance was a proper consideration, upon a question of exemplary damages, and should have been incorporated in the third.

Every trespass, whether willful or not, is an injury for which the party wronged is entitled to compensation, and the measure of compensation prescribed by the third prayer, was the lowest established by law, in this peculiar class of cases, independently of all aggravating features.

The court below was therefore right in rejecting the testimony proposed in the third and fourth bills of exception, and in granting the appellees' third prayer.

The cases to the contrary are generally cases in equity, where greater latitude is assumed by the courts in controlling the rights of the parties.

The appellant's second prayer, being the converse of the proposition contained in the appellees' third, is disposed of by the views above expressed and was, in our opinion, properly rejected for the reasons assigned.

The first prayer of the appellant, which is included in his fifth bill of exceptions, is based upon the theory that it was not competent for a witness not present at the survey to testify for the plaintiffs, to prove any object connected with the survey, or intended for illustration thereof. This prayer is understood to refer to the testimony offered in the plaintiffs

first bill of exceptions, which is not before this court, and in which the court rejected the testimony indicated in the appellant's prayer. To that extent the appellant had the benefit of the principle involved in it; but however correct such ruling might be, when applied to any particular witness at the time of the examination, a general instruction, after the testimony was closed, that if they find from the evidence, etc., any of the witnesses were not present, etc., such an objection would be too late, upon the well established principle that an exception to testimony must be taken before, or at the time of its being submitted; it can not be raised after the testimony is closed, except upon a general reservation of all exceptions to evidence, and then the particular evidence objected to should be pointed out. The appellant's first prayer was therefore properly rejected, no reservation of this kind appearing, and nothing in the record indicating to what witness or witnesses it was intended to apply.

The appellant's fourth, fifth and eighth prayers, included in his fifth bill of exceptions, affirm, first, that if the jury find that John A. Smith executed the will offered in evidence by the plaintiffs, then the will vests the title to the "*locus in quo*" in Sally Smith, the devisee, and no injury to the lands, as real estate, and to the fee in said lands, can be recovered by the executors of John A. Smith, under the pleadings and evidence in the cause. Secondly, that the executors can not recover on the pleadings and evidence, for any injury done to the lands which would affect their value as coal lands, after the testator's death.

Thirdly, that the executors are not entitled to recover on the pleadings and evidence for any damages to the coal now remaining in the lands in controversy, and which would affect the right and interest of Mrs. Smith, as devisee.

The argument in support of these propositions, as condensed from the brief is, that the declaration claims only damages for mining and carrying away coal (there is no allegation of injury done by unskillful mining), and gives no notice that such damages would be claimed as were claimed under the rulings of the court in the third and fourth prayers of the plaintiffs; such damages could only be claimed on a special allegation. Mr. Smith, having devised all his real estate, personal and mixed, to Mrs. Smith, the lands in controversy passed

to her, and such damages as did not result necessarily and during the life of the testator, but would only affect their value as coal lands after his death, could not be recovered, under the declaration which did not set them out specially.

That the damages claimed are partly for mining improperly, etc., whereby the lands were injured as coal lands, for which the executors could not recover, because that was recoverable by the devisee in her own right.

The action in this case, as we have seen, was instituted in the lifetime of the testator, Smith, by his co-plaintiffs and himself, holding, as alleged in the third count, undivided portions in fee simple in the lands; the trespasses alleged were injuries to their right and estate as tenants in fee, and any act of trespass which impaired the value of the estate, either temporarily or permanently, gave the plaintiffs but one cause of action; the *narr.* charged sundry trespasses between the 21st of August, 1864, and the day of instituting the suit—less than three years. The injuries complained of are digging and sinking divers mines, drifts, pits, shafts, etc., of great length, breadth and depth, and from out of said mines, etc., raising earth, soil, stones, coal, iron ore and other minerals, etc., and taking and carrying them away; operations of this kind could not be continuously carried on for a series of years without impairing the fee simple value of the land, in the life of the testator; and his co-plaintiffs and himself, and his executors after him, had the right to recover the full value of the property injured, even if it absorbed the fee simple. The devisee took only what remained after the testator's death. She could institute no action for the consequences of the trespass committed in the testator's life; there could be but one satisfaction for the injuries done him. Opening of mines is a species of waste, which tends to the permanent and lasting loss of the person entitled to the inheritance: See Cruise's Digest, Title III, Ch. 11, Sec. 16. A tenant for life can not open a new mine. The *narr.* therefore charged the most serious injury which could have been inflicted on the fee, or inheritance, and necessarily involved all the natural results of waste, for which damages were recoverable without further specification. Art. 75 of the Code of P. G. Laws, enacts, that "whatever facts are necessary to constitute the ground of

action, shall be stated in the pleading, and nothing more." "Any declaration which contains a plain statement of the facts necessary to constitute a ground of action, shall be sufficient." The appellant argues, that trespass *q. c. f.* is a possessory action, and damages for injury to the possession only can be recovered. Injuries to the corpus of the land, however destructive, because it operates on the value of the fee, can not be compensated in an action for damages by the executors. The injury is one entire thing if it occurs in the life of the owner of the fee, he or his executors are the only persons competent to sue for and recover the damages commensurate to the loss sustained.

As far as these prayers attempt to raise the objection that there was a variance between the declaration and the evidence, they do not present that question generally, but in a very qualified form.

The fifth prayer affirms that the executors of John A. Smith can not recover, on the pleadings and evidence in this cause, for any injury done to the lands in controversy *which would only affect their value as coal lands after the death of the testator.*

The eighth re-affirms the same proposition in different language: "The said executors of John A. Smith are not entitled to recover, on the pleadings and evidence in this cause, for any damage to the coal now remaining in the lands in controversy, which would affect the right and interest of said Sally Smith as devisee," etc.

The predominant idea presented in these prayers is, if the injury was such as impaired the value of the fee, the executors could not recover. We have anticipated and answered this objection, but assuming the objection was intended in its broadest and widest sense—

This is not like the case where the point was raised below by objecting to the *admissibility of the evidence*, as in *Ellicott v. Lamborne*, 2 Md. 132, where the declaration charged that earth, sand, etc., were washed into the plaintiff's mill dam so as to render it useless in working his mill, and the evidence offered was that the stream was rendered so impure that it was unfit for washing rags, so as to fit them for making *white paper*. There the variance was broadly presented *in limine*,

and the attention of the court necessarily called to the *allegata* and *probata*; but in the present instance, the objection is not to the right to recover because of variance, but because of its supposed effect upon certain interests of persons not parties to the cause. The real objection, if intended to be made, was masked under a form of words which entirely concealed it.

These prayers point to the pleadings and raise an objection which was untenable, and having been correctly rejected on that ground, they can not now be used for the purpose of presenting points, which do not appear from the record to have been raised below.

The appellant's ninth and tenth prayers, included in his fifth exception, are covered by our remarks on the preceding.

No specific objections have been made in argument to the granting of the appellee's first and second prayers, besides those embraced in the argument of the appellant's fourth, fifth and eighth prayers. The reasons which sustain the action of the court below in rejecting the latter, apply with equal force in maintaining the propriety of granting the former.

Finding no error in the several rulings of the court below, by which the appellants were prejudiced, the same will be affirmed.

Judgment affirmed.

ROBINSON, J., dissented as to the measure of damages.

McHOSE ET AL. V. FULMER ET AL.

(73 Pennsylvania State, 365. Supreme Court, 1873.)

Breach of contract—General rule. When a vendor fails to comply with his contract, the general rule for the measure of damages is the difference between the contract and market price at the time of the breach.

¹ **When the article can not be obtained in the market,** the measure is the actual loss the vendee sustains.

Where vendee has in the meantime resold the article. McHose, a manufacturer, contracted for iron from Fulmer, who failed to comply, and McHose could not supply himself in the market. *Held*, that the measure of damage was the loss he sustained by having to use an inferior

¹ *Hazleton Co. v. Buck Mt. Co.*, 2 M. R. 389.

article in his manufacture, or in not receiving the advance on the contract price upon contracts he was to fill, relying on Fulmer's contract.

Error to the Court of Common Pleas of Lehigh County.

This was an action of assumpsit, brought January 25, 1872, by Henry Fulmer and Peter Uhler, trading as the Easton Iron Manufacturing Company, against Samuel McHose and others, trading as Samuel McHose & Co.

The cause of action was the following note:

"\$1237.25.

ALLENTOWN, Oct. 27th, 1871.

Sixty days after date we promise to pay to the order of Easton Iron Manufacturing Co., twelve hundred and thirty-seven dollars and twenty-five cents, at First. Nat. Bank of Allentown, Penn., without defalcation, for value received.

SAMUEL MCHOSE & CO."

The defendants filed an affidavit of defense, to wit:

The plaintiffs and defendants entered into a contract about the 20th of October, 1871, by which the plaintiffs agreed to furnish defendants with 100 tons of pig iron, to wit: 50 tons at \$30 per ton, and 50 tons at \$32.50, to be furnished in the months of October and November, 1871. In October, plaintiffs, in pursuance of said contract, did furnish to defendants 40 tons of pig iron, to wit: 30 tons at \$30 per ton, and 10 tons at \$32.50, making total of \$1,225, the amount for which the note in this case was given, with interest added.

The residue of the iron, according to said contract, was to be furnished in the month of November, and the defendants being engaged in the manufacture of iron, relying upon the undertaking of plaintiffs, made no other engagement for iron. In the month of November the defendants gave notice to the plaintiffs that they were in need of said iron, to wit: the sixty tons which the plaintiffs neglected and refused to furnish, although often requested so to do, in the months of November and December. The contract for payment was notes at sixty days.

The defendants therefore say, that by the refusal of the plaintiffs to furnish said iron as per contract, they (the defendants) have suffered damage to an amount exceeding the whole amount of the note in which suit is brought.

The nature of the damage sustained by defendant is as follows:

The defendants are the owners of the Hope Rolling Mill, situated in the city of Allentown, and are carrying on the business of making merchant bar iron, and employ about sixty hands, and had heavy contracts for iron to be furnished in November and December. By the neglect and refusal of plaintiffs to furnish said iron, defendants were obliged to get an inferior quality of iron than that which plaintiffs were to furnish, in order to carry on the business of said mill, and being inferior, they lost the contract with the parties with whom they had contracted for the sale and delivery of iron, and sustained other serious damage and loss by the breach of said contract on the part of plaintiffs.

They afterward made a supplemental affidavit of defense, "that by reason of the plaintiffs neglecting and refusing to comply with the contract set forth in said affidavit of defense, the defendants were unable to get the same quality of iron, and iron had advanced in price one dollar per ton, which would make \$60 damages in price of iron.

"The defendants further say that the loss of contracts and in the sale of manufactured iron greatly exceed the amount of the note on which suit is brought. That defendants not being able to make good iron for the parties with whom they had contracts, they sustained losses as follows: With Brinton & Johnson, of Philadelphia, they sustained losses in iron returned, \$639.47, which amount is composed of labor and freight in sending and returning said iron, and the damages for the loss of the contract with said Brinton & Johnson will exceed the sum of \$600; making a total of more than the amount of said note. That they have suffered other damages by reason of the failure of said plaintiffs to comply with their contract."

On the 17th of July, 1872, the court (LONGAKER, P. J.) entered judgment for the plaintiffs for \$1,218.45, the amount of the note and interest "less \$60, claimed as the appreciation of the iron."

The defendants removed the record to the Supreme Court, and assigned the entering of the judgment for error.

J. D. STILES, for plaintiffs in error.

E. J. MORE, for defendants in error.

The opinion of the court was delivered, March 24, 1873, by SHARSWOOD, J.

When a vendor fails to comply with his contract, the general rule for the measure of damages undoubtedly is the difference between the contract and the market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee can not thus supply himself the rule does not apply, for the reason of it ceases: *Bank of Montgomery v. Reese*, 2 Casey, 143. "It is manifest," says Mr. Chief Justice Lewis, "that this (the ordinary measure) would not remunerate him when the article could not be obtained elsewhere." If an article of the same quality can not be procured in the market, its market price can not be ascertained, and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfillment of the contract by the vendor. We do not mean to say that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay to his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfillment of the contract. The affidavits of defense are not as full and precise upon this point as they might and ought to have been, but they state that the defendants below had entered into such contracts, and that they were unable to get the same quality of iron which the plaintiff had agreed to deliver, and this, we think, was enough to have carried the case to a jury.

Judgment reversed and a procedendo awarded.

LAUBACH V. LAUBACH.

(73 Pennsylvania State, 387. Supreme Court, 1873.)

Contract to rescind stock sale. J. sold stock in a silver mining company to T., and agreed that when T. should desire it he would take it back and repay the price: *Held*, that upon tender of the stock and refusal to refund the price, the measure of damages was the price, with interest from date of tender.

On refusal by a vendee to accept goods sold him, the measure of damages is the difference between the contract and the market price at the time of refusal.

¹ **Where the contract is that the vendee may rescind** the contract, the vendor to pay back the price, or the contract is rescinded by the vendee by reason of inherent vice, the measure of damages is the price paid and interest.

General objections to evidence. Where there is a general objection to evidence and part is admissible, it is not error to overrule the objection, although part of the offer be inadmissible. In such case there must be a special objection to the inadmissible part.

Error to the Court of Common Pleas of Lehigh County.

This was an action of assumpsit, brought April 22, 1870, by Thomas Laubach against Joseph Laubach.

The plaintiff alleged that in August, 1858, he bought from the defendant, his brother, 100 shares of the capital stock of the Brown Silver Mining Company, for \$5,000, the defendant agreeing at the time, as part of the contract, to take it back if the plaintiff should desire it, and repay the sum paid for it. The plaintiff having tendered the stock and demanded the repayment, the defendant refused, and this suit was brought for the recovery of the money, with interest.

The plaintiff testified that in August, 1858, he met the defendant at Catasauqua, in the Eagle Hotel, kept by Frank Laubach, defendant's son. The defendant, after he and his son had exhibited the promising prospects of the mine and solicited the plaintiff to purchase stock, said that if plaintiff would take stock he would insure it to him, and if at any time plaintiff wanted his money back, defendant would take the stock and give him his note for it. Defendant said that they had \$20,000 worth of stock for the Laubach family and their friends.

¹ *Page v. Parker*, 6 M. R. 545; *Perkins v. Rice*, 6 Litt. 218; *Post RE-SCISSION*.

Upon these assurances the plaintiff took 100 shares of stock and paid the defendant \$5,000 for it. Subsequently three certificates of the stock, making in the aggregate 100 shares, were delivered to plaintiff.

On March 5, 1870, the plaintiff signed transfers on the back of the certificates and tendered them to the defendant, and said to him, "Here is the stock you said you would take back any time I did not want it, and give me my money back." Defendant denied having promised him that he would take the stock and pay back the money.

The plaintiff testified to other facts in support of his case, and gave other evidence in corroboration of his own statements as to the contract and of the tender of the stock and demand of the money.

Plaintiff also testified that Frank and William Laubach, sons of the defendant, were present when the contract was made, and were called by their father to bear witness to what he said, and also that they were present on other occasions when the father made similar statements.

Frank Laubach testified in direct contradiction of the plaintiff as to the interview and what was said to have occurred in his presence.

On cross-examination he said: "Thomas offered, in the parlor, in presence of Adam, on my inducement, to take the stock; my father wasn't in the habit of selling this stock; he never sold any stock; my father never sold any stock to Mrs. Strauss; nor to John Laubach; nor to John A. Laubach; nor to Adam Laubach; nor to Captain John Laubach; nor to Michael O. Newhart; don't know that he offered to sell to Samuel Straub; nor do I know whether he guarantied the stock to Mrs. Strauss; he never guarantied stock to anybody in my presence; * * * I didn't direct my father to sell this stock to Mrs. Strauss; I sold it to her indirectly; I saw her before the sale was made, at Catasaqua, and induced her to take it; * * * my father was not my agent to sell stock for me; * * * I never heard my father say anything to Capt. John Laubach about the sale of this stock, nor did I ever hear that he guarantied the stock to him, nor that he guarantied it to any one else; I sold the stock to Mrs. Matchett; she never paid the whole of it; I sold it for her to my father; it was not sold on a guaranty; it was three shares; Michael and

Owen Newhart got stock from me; I sold it directly to them; I got the money; it did not pass through my father's hands; it was paid to me directly; my father knew nothing about my transactions with these people, except with plaintiff; Adam Laubach got forty shares from me directly; my father didn't guaranty it to Adam; am sure he didn't; plaintiff was at my house in March, 1870, when he tendered the stock back; he was there once after that."

William Laubach also testified in direct contradiction of plaintiff's testimony.

Joseph Laubach, defendant, testified in the same manner as his sons.

He further testified: "I was not the owner of the 100 shares sold to Thomas; had no interest in them at all; I got none of the proceeds of the sale, nor did I tell my brother, John Laubach, that if Thomas took stock I would take it back; I never promised any man that I would take stock back; I had some conversation with my brother John, but I didn't say that to him; I think it was in November, 1869, that plaintiff for the first time came to me and said he wanted me to pay him for the stock I guarantied to him. I said, 'What stock?' He said, 'The Brown Silver Mining stock.' I said I had never sold him any stock, and had never guarantied him any. He came to me several times about it, and teased me about it. I told him if he didn't like me as a brother he could shoot me and have me out of the way; I never made him any promise that I would take the stock back from him at any time."

On cross-examination, he said:

"I sold some stock to Mrs. Strauss, with the consent of my son; her name was Laubach; I got the money for it and gave it to my son; I got two checks, payable to me; I made the contract with her to take the stock; I didn't guaranty to take it back; I told her at any time she didn't want it I would take it back and pay her the money with interest; I told her that at any time she was tired of it I would take back the stock and pay the money with six per cent. interest; I did take it back; I never sold Capt. John Laubach one share of stock; I didn't sell him a share, nor make the same promise to him as I did to Mrs. Strauss; on my return from Easton I stopped to see my sister, Mrs. Bachman; I offered to sell her stock,

and told her if she would take it I would guaranty it, the same as I had done to Mrs. Strauss ; I did not, to my recollection, ask Samuel Straub to buy stock ; I didn't tell him that we had \$20,000 expressly for the Laubach family and their friends, and that he was one of their friends ; I didn't tell him that I had sold stock and had guarantied it ; didn't tell him I had sold stock at Catasauqua, and that I had guarantied it all or insured it, nor anything of the kind ; I told Aaron Fretz that I had got all in except Adam, and I would have him in yet ; I said I would try ; didn't sell stock to my brother John ; didn't guaranty it to him the same as I did to Mrs. Strauss ; didn't sell to Capt. John Laubach and guaranty it also ; nor to John A. Laubach and guaranty it, nor to Adam Laubach and guaranty it, nor to Michael and Owen Newhart and guaranty it ; nor did I tell Owen Newhart, in the presence of Michael, that I would take the stock back if he didn't like it ; nor to Michael, and guaranty it in the presence of Owen ; I didn't say anything to Captain John Laubach, John Laubach, John A. Laubach, Adam Laubach and Michael and Owen Newhart, and Samuel Straub, about selling stock to them ; I offered Hannah Schadt stock, but I never said anything about \$20,000 worth of stock for the Laubach family ; I told her I would take the stock back at any time she was tired of it, and pay the money back ; I went to see her, to know if she wanted stock ; she had no money and took no stock ; I told her it was paying one per cent., but I didn't tell her she would get back all her money in two or three years ; I told David Schadt it was a good thing, and told him he should get his sister to buy ; I didn't tell Thomas and Adam, nor any of the Laubachs, that there was \$20,000 reserved expressly for the family." * * *

The plaintiff in rebuttal called Capt. John Laubach, and offered to prove by him "that Joseph Laubach offered to sell him stock, and did sell it to him, and guarantied it, alleging at the time that it was a portion of the \$20,000 worth of stock which he had expressly reserved for the Laubach family."

Objected to by the defendant's counsel as not rebutting testimony ; that it is in relation to matters collateral to this suit ; that it is irrelevant and can not be offered to contradict the testimony of Joseph Laubach ; that if it is evidence at all, it is

evidence in chief. "Plaintiff says the testimony is offered for the purpose of rebutting the allegations of the defendant, that he was not engaged with the sale of the Brown Silver Mining Company, and for the purpose of contradicting Frank, Joseph and William Laubach."

The offer was admitted and a bill of exceptions sealed.

Witness said: "The defendant offered to sell me stock of this company in the beginning of August, 1868; it was at his place at the Eagle Hotel; he said he had \$20,000 worth expressly for the Laubach family; I told him I couldn't see the point yet; I had enough water-hauls; then he said, if you don't like it I'll pay your money back; then he told me the per cent., one, two and three per cent. a month; he said, you shall just take it, and if you don't like it you come to me and I will pay your money back, and if I haven't the money I will give you my note; he said he had all the family in except Adam and John, and he would get them in yet; I gave this note as part payment of the stock; I gave defendant all the money; I gave him \$5,000 in all."

Plaintiff then called each of the other persons to whom the defendant denied in his testimony that he had sold stock, and proposed similar questions to each of them. They were admitted under exception and objection to testify.

They testified substantially in accordance with the offer.

The plaintiff offered in evidence the book, the pamphlets and circulars of the company, and the notes and checks testified to by the witnesses. They were objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

The court (LONGAKER, P. J.), amongst other things charged:

* * * "Before you proceed to weigh the strength or power of the evidence, it becomes the duty of the court to admonish you that if you find it to be a fact that the defendant was engaged in selling the stock to others, and that he guarantied to them and promised to redeem at par the stock thus sold, the fact so proven is not a circumstance from which you are at liberty to infer or find that the defendant made a like promise to the plaintiff. Because the defendant may have promised others to redeem the stock sold to them is no reason which will enable you to say that he promised the plaintiff to redeem the stock in suit."

"The plaintiff was permitted to prove that the defendant made the guaranties to others, in order to show that he was engaged in the sale of this stock, and to meet that part of the defense in which it is said that the defendant was not engaged in the sale of this stock, but that his son Frank was the agent of Watson; and that he, and not his father, made this sale, and that the father had nothing to do with effecting a sale of this stock to plaintiff." * * *

"If under these instructions you can not find a contract of guaranty in favor of the plaintiff, your verdict will be generally in favor of the defendant. [If, however, you do find in favor of the plaintiff, the amount of your verdict will be for \$5,000, with interest from March 5th, 1870.]"

The verdict was for the plaintiff for \$5,582.50. The defendant took a writ of error, and assigned for error:

1. That part of the charge in brackets.
- 2-10. Admitting John Laubach and the other witnesses objected to.
11. Admitting the pamphlets and circulars of the company, etc., in evidence.

H. GREEN and C. M. RUNK, for plaintiff in error.

E. HARVEY, J. D. STILES and C. D. ERDMAN, for defendant in error.

SHARSWOOD, J.

The first assignment of error is intended to raise the question, whether the instruction of the learned judge below to the jury, as to the measure of damages, was correct. There was no dispute as to the amount which the plaintiff had paid for the stock, nor that he had made a regular and formal tender of it back to the defendant, and demanded the return of the money, or a note, in conformity with the agreement. The plaintiff in error supposes that the same rule is applicable in this case as in the ordinary case of the refusal of a vendee, before any title to the property has passed to him, to accept goods which he had previously agreed to buy. The authorities which have been cited abundantly show that there the measure of

damages is the difference between the contract and the market price at the time of the refusal or breach. But the mistake is in considering that this was a contract to purchase or re-purchase. If the jury believed the testimony of the plaintiff, and that was left to them, and upon his credibility the whole controversy hinged, then it was an agreement by which, as one of the terms of the sale, the plaintiff was to be at liberty to rescind the contract, and the defendant undertook in that event to pay back the price or give his note for the amount. It is like the very common case of the purchase of a horse, where the buyer pays the price, but stipulates that after a reasonable trial, if he should not be satisfied with the animal, he may return him and receive back the price paid. No one has ever supposed that this was to be construed as a contract to re-purchase, or that upon the exercise by the vendee of the option reserved, the title does not revert in the original vendor, and the right to the price in the vendee. This is the legal effect of the rescission of a contract, whether the rescission be by reason of an inherent vice, such as fraud, or by virtue of the terms of the contract itself: *Smethurst v. Woolston*, 5 W. & S. 106. .

The nine following assignments all relate to one and the same question. The plaintiff had testified that the defendant stated to him as an inducement to the purchase, that he had reserved twenty thousand shares of the stock of the company in dispute for the Laubach family, from which the inference was that he was the agent of the company for the sale of the stock. When the defendant was put upon the stand as a witness for himself he denied that he had made this statement, and that he had ever said anything to certain persons named about selling stock to them. This was certainly relevant to the issue trying, and the defendant might be contradicted in regard to it, for it bore directly upon the main question, whether he or his son Frank had made the sale to the plaintiff. It was true he was also asked whether he had guarantied the stock sold to these persons, as it was alleged he had done to the plaintiff. It may well be that this was entirely collateral and irrelevant, and his answer conclusive according to the familiar rule, that a witness can not be contradicted as to collateral and irrelevant matter brought out upon cross-examination. It is, however, unnecessary to de-

cide this, because the offer to contradict him in this respect by the testimony of the persons who had been named to him, was made in connection with an offer to contradict him as to the other relevant matter that he had not spoken to them about the sale of the stock. The objection to the offer was a general one, and if any part of it was admissible the judge can not be convicted of error in overruling such general objection. In such a case it is the duty of the party objecting to call the attention of the judge particularly to that part which is inadmissible by a special objection. This is but fairness to the judge. In the pressure upon his mind in the necessary hurry of a jury trial, he can not be required to scrutinize narrowly every part of an offer, and to distinguish in it the admissible from the inadmissible, though he may do so; and especially is this true when the objection goes merely to relevancy, the shades of difference as to which are often so slight. The learned judge below, in his charge, instructed the jury that the fact that the defendant had guarantied and promised to redeem stock which he had sold to others, was not a circumstance from which they were at liberty to infer or find that he had made a like promise to the plaintiff. We think, therefore, that there was no error in the admission of this evidence, of which the defendant below, the plaintiff in error, has any right to complain.

As to the eleventh assignment, it is enough to say, that we have not been furnished with copies of the books and circulars of the company, so as to enable us to judge of their competency and relevancy. If the defendant was the agent of the company in making sale of the stock, of which there was some evidence, these books and circulars may well have been admissible if their contents were relevant. Indeed, this assignment does not seem to be pressed, as the counsel for the plaintiff in error did not notice or explain it, either in his printed or oral argument.

Judgment affirmed.

FOOT ET AL. V. MARSH ET AL.

(51 New York, 288. Commission of Appeals, 1873.)

Constructive delivery. In order to substitute an arrangement between parties for a manual delivery of a parcel of property, mixed with an ascertained larger quantity, the portion sold must be so clearly defined that the purchaser can take it, or maintain replevin for it.

Complicated oil contract—Parol proof excluded—Sale by sample. Defendants sold to plaintiffs 100 barrels (4,000 gallons) of oil, and agreed in writing to deliver the oil when called for, the quality of the oil to be like the sample delivered. It was understood by both parties that the oil was a part of a lot of 150 barrels, averaging forty gallons each, but the plaintiffs were not informed that there were three different grades in the lot. Upon demand by plaintiffs, several months later, the defendants delivered 100 barrels containing but 1,821 gallons, of quality inferior to sample. The diminution was due to leakage. In an action to recover for the breach of contract, *held*: (1) that conversations relative to the agreement, held prior to the written contract, should have been excluded from the jury; (2) that the writing was the only proper evidence of the contract; (3) that it proved an executory, not an executed, contract; and (4) that defendants were bound to deliver the whole quantity of oil specified when called for.

Appeal from order of the General Term of the Supreme Court in the Fifth Judicial District, reversing judgment in favor of plaintiff, entered upon a verdict and granting a new trial.

This action was brought to recover damages for the alleged breach of a contract of the sale and delivery of a quantity of oil. On the trial it appeared that a party in Syracuse, having about 150 barrels of oil consigned to him for sale, 46 of which was known as Murray oil; 47 as Buffalo and Erie oil; 36 as Lemon oil, and 21 barrels of oil marked V. B. That the Murray oil had preference to the other oils on account of its reputation, and was worth two cents per gallon more than the Buffalo and Erie oil, or the oil in barrels marked V. B., and that the 36 barrels known as Lemon oil were inferior to either of the other descriptions, and that a portion of the entire quantity being then in the cellar of the warehouse of Thompson, Gage & Co., and the residue in the cellar of the warehouse of a Mr.

¹ *Adams Co. v. Senter*, 1 M. R. 241.

Davis of that place, proposed to sell them to the defendants at sixteen cents per gallon. The defendants, not caring to purchase the whole, replied that if they could sell a portion and retain a portion they would buy. The consignee thereupon gave to one of the defendants a sample of oil, which, as the consignee at first testified, was a poor specimen of the most inferior oil; but upon cross-examination it appeared to have been taken from the Buffalo and Erie oil, with which the defendants went to the plaintiffs' place of business at Rome, Oneida county, and exhibited to them the sample, told them where the oil was, and proposed to sell to them a portion of the whole 150 barrels. An agreement was finally concluded for a sale to the plaintiffs of 100 barrels of oil, by the sample then exhibited, for which the plaintiffs were to give their note at three months; and as the barrels contained different quantities, in order to ascertain the amount for which the note should be given, it was agreed that each barrel should contain an average of forty gallons, in all 4,000 gallons, and that they should be subject to twenty shillings storage per month until called for. There was upon the trial a conflict in the parol evidence as to whether it was not a part of the agreement for the purchase and sale of the oil that the defendants and not the plaintiffs should risk the leakage. There was also a conflict in the evidence as to whether it was not a part of the agreement that the defendants should set apart 100 barrels containing an average of forty gallons to the barrel, and as to whether they did not so set it apart in the place of its storage. It also appeared that after the parties had concluded all negotiations and come to an agreement for the sale and purchase of the oil, the plaintiffs executed and delivered to the defendants their note for the \$870 (the amount agreed upon), and the defendants executed and delivered a bill of sale as follows:

"N. B. Foot & Co. bought of Marsh, Delaye & Rogers, 100 barrels at twelve shillings, \$150; 4,000 gallons of oil at eighteen cents, \$720—\$870. Received payment by note at three months from June 7, 1862.

"MARSH, DELAYE & ROGERS."

"The above oil is to be delivered when called for, subject to twenty shillings per month storage, and the quality of the

oil is to be like the sample delivered. Marsh, Delaye & Rogers."

Defendants thereupon accepted the offer previously made by the consignee for the sale of the whole 150 barrels. When the plaintiffs' note matured they paid it, and afterward, on the 11th of November following, called upon the defendants for a delivery of the oil, and were shown 100 barrels, which contained in all but 1,821 gallons, worth from five to ten cents per gallon less than the sample by which they purchased. The evidence tended to show that the loss occurred by leakage from the barrels in which it was stored, and that the depreciation in the quality was largely if not entirely attributable to the same cause. It also appeared that the remaining 2,179 gallons, if equal to the sample, would, at the time plaintiffs called for a delivery of the oil, have been worth \$1,198.45. The defendants' counsel objected to proving a deficiency, and, after the evidence closed, insisted that by the writing the contract for its sale was not executory, but an executed contract, and, in substance, if any loss was thereafter occasioned by leakage, it was the plaintiffs' and not the defendants' loss; and, hence, that there was no question for the jury. But the court ruled otherwise, and the defendants excepted.

The court charged the jury that if, from the evidence, they should find that it was agreed between the parties that the defendants should set apart 100 barrels of oil, averaging forty gallons to the barrel, of a quality equal to the sample, and that they *did* set apart that number of barrels, containing that average quantity, and of a quality equal to the sample furnished; that from thenceforth the oil was at the plaintiffs' risk, and they could not recover. But if, on the contrary, there was no such agreement made or authority given the defendants to set apart the oil, that then the contract became, from its terms, a contract to deliver 4,000 gallons of oil when called for, and that the defendants were bound to have it on hand when called for. To this part of the charge the defendants excepted. The court further charged that, if there was no authority given the defendants to set apart the oil, there was a deficiency for which the plaintiffs were entitled to recover \$1,198.45, with \$273.10 interest from the time of demand, making in all \$1,471.55. To so much of the charge as in-

structed the jury to allow interest, the defendants excepted. The jury rendered a verdict for \$800, and thereupon the defendants, upon the minutes, moved for a new trial, which was denied, and judgment ordered and entered upon the verdict.

D. M. K. JOHNSON, for the appellants, who were plaintiffs below.

J. D. KEERNAN, for the respondents.

GRAY, C.

The principal question presented for our consideration arises upon the defendants' exception to that portion of the charge given by the judge to the jury, in which he stated in substance, that if no agreement was made, or authority given to the defendants to set apart for the plaintiffs the oil described in the contract, that then the contract, from its terms, became a contract to deliver 4,000 gallons of oil when called for, and that the defendants, in order to comply with the call, were bound to have that quantity on hand whenever the call should be made. This case is by the defendants likened to the case of *Kimberly v. Patchin*, 19 N. Y. 330, and the grounds upon which this portion of the charge is claimed to be erroneous is, that the contract, when read by the light of the circumstances surrounding it, is in principle like the contract in that case, for the sale of 6,000 bushels of wheat, parcel of 6,249 bushels, at seventy cents per bushel, of which no separation or manual delivery was made; but as a substitute for a manual delivery, and to constitute the contract for its sale, an executed, not an executory, contract, the vendor gave to the purchaser his receipt for it, agreeing to deliver it to his order, free of all charges; whereupon the vendor was held to have constituted himself the bailee of the wheat, and to have thenceforth stood in that relation to the purchaser and the property; to render the contract effectual as an executed contract from the time it was made, the purchaser must have been invested with the right, after demand, to take the property. This was a right the defendants, at the time of making the sale, had no power

to confer, they not being at the time the owners of any portion of it; nor did they, in the place of a manual delivery, give to the plaintiffs their receipt for it, and thus attempt to constitute, themselves the bailees of the plaintiffs and of the oil, as did the vendor of the wheat in *Kimberly v. Patchin*. If the 150 barrels of oil, of which the 100 barrels and the 4,000 gallons were understood to be a part, were, like the wheat, all of the same quality, so that nothing but the quantity, without reference to quality, was to be taken from the larger amount, the extrinsic facts that the sale was at a profit of only two cents per gallon, and the risk of leakage during the summer months so largely exceeded the profits of the sale, it might be urged, with more plausibility than it now can, that the agreement of the defendants to deliver the barrels and oil when called for, was like the agreement contained in the receipt in *Kimberly v. Patchin*, to deliver the wheat to the order of the purchaser, and that the defendants should, under the circumstances, as was the vendor in that case, be regarded as the bailees of the plaintiffs. But, in order to substitute an arrangement between the parties for a manual delivery of a parcel of property, mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or, as the assignee of the purchaser did in *Kimberly v. Patchin*, maintain replevin for it. In this case the larger quantity, parcel of which was understood to be contracted to the plaintiffs, consisted of 150 barrels containing three different qualities of oil, but sixty-eight of which (forty-seven of the Buffalo and Erie oil, and twenty-one barrels marked V. B.) corresponded with the sample by which the 100 barrels were sold. The residue, forty-six barrels of the Murray oil, was superior to the sample; and thirty-six, known as the Lemon oil, were inferior to the sample. The plaintiffs would not have the right to take the Murray, or superior oil, and could not be compelled to take the Lemon, or inferior oil. And, if the sample was, as the witness at one time stated, a poor sample of the most inferior oil, then but thirty-six barrels of that description, containing less than 1,500 gallons, could have been selected from the whole quantity, and hence, the plaintiffs were without adequate means of redress, unless by action, for failing to deliver the quantity of oil sold conforming to the sample. The

fact that the oil, which was the subject of the sale, was understood by the plaintiffs to be a parcel of a larger quantity, and that the sale was made at a profit of only two cents per gallon, while the risk of loss by leakage and evaporation was very large, are circumstances that would go far to prove that the defendants did not understand the legal import of the writing drawn and subscribed by them, or that they were overreached by the plaintiffs, who suggested their terms after, as one of them had testified, they refused to purchase, unless the defendants would guarantee them against leakage, which the defendants refused to do. But as no question was raised by the pleadings or elsewhere, as to a reformation of the contract, we must regard it as expressing the intentions of the parties, and give it the interpretation which, under the circumstances, its language plainly imparts. The charge was more favorable to the defendant than a fair construction of the written contract warranted. The conversations, out of which the defendants sought to establish an agreement between the parties, that the defendants might set apart the 100 barrels of oil for the plaintiffs, as well as the conversations as to the guarantee against loss by leakage, were all prior to the reduction of their agreement to writing, and should have been excluded from the consideration of the jury, leaving the writing as the only evidence of the agreement to be interpreted by the aid of extrinsic facts. No error was committed in the instructions to allow interest. The verdict was more favorable to the defendants than the charge warranted; of that, however, they can not, upon this appeal, complain.

The order appealed from should be reversed.

All concur.

Order reversed.

ROBERTSON V. JONES ET AL.

(71 Illinois, 405. Supreme Court, 1874.)

Trespass for taking coal. In an action of trespass for the taking of coal from the mine of another, the measure of damages is the value of the coal in the bank after it is dug, or the value of the coal at the mouth of

the pit less the cost of conveying it, after dug, from the mine to the mouth of the pit.

The plaintiff is not limited in his recovery to the value of the coal taken as it lay in the bed.

¹ **Trover, after demand, for coal severed by trespasser.** If one wrongfully take coal from the bank of another, the latter may, at any time after the taking, demand it, and upon refusal to deliver, might, it seems, in an action of trover, recover the value of the coal in its condition at the time of such demand.

Appeal from the Circuit Court of Madison County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

CHARLES P. WISE, for the appellant.

JOHN W. COPPINGER, for the appellees.

CRAIG, J., delivered the opinion of the court.

This was an action of trespass brought by appellant in the Circuit Court of Madison County, against appellees, to recover damages for coal taken from the mine of appellant.

It was conceded upon the trial that appellees had dug and taken from the mine of appellant 17,700 bushels of coal, and the only question presented by this record is as to the correct measure of damages for the coal taken.

The circuit court, on the admission of evidence, held, that appellant was only entitled to recover the value of the coal in the mine before it was taken out, and at the request of appellees instructed the jury as follows: "The court instructs the jury that if they find for plaintiff, the measure of damages will be the value of coal taken, in the ground, as shown by the testimony."

It is said by Kent, in volume 2, p. 362: "It was a principle settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials, as, if leather be made into shoes, or cloth into a coat, or a tree be squared into timber."

In *Betts & Church v. Lee*, 5 Johns. 348, it was held that where one person entered upon the land of another and cut

¹ *McLean Co. v. Long*, 10 M. R. 193.

down trees, and sawed and split them into shingles, and carried them away, the conversion of the timber into shingles did not change the right of property.

In the case of *Davis v. Easley*, 13 Ill. 198, it was held by this court, if one enter upon the land of another, cut down trees and convert them into boards, the owner of the trees can maintain replevin for the boards. This proceeds upon the principle that the owner of property, wrongfully taken, may pursue and recover it, by any appropriate action, so long as it can be identified.

From these authorities it follows, that had appellant instituted an action of replevin when the coal had been dug and placed in the bank, he could have obtained the coal; or had the coal been demanded at any time after it was taken from the bank, and while in possession of appellees, appellant could have, in an action of trover, recovered the value of the coal in its then condition, at the time demand was made and the property converted. In either event appellees would have obtained nothing for digging the coal, or other expenses connected therewith.

This, however, is an action of trespass. No demand was ever made for the coal or action brought to recover the specific property. Upon this principle, what should be the proper measure of appellant's damages? When the coal was dug from the bed it became and was converted by appellees from its original condition into a chattel. The moment it was severed from the freehold, a right of action then existed in favor of appellant. If he could maintain replevin and recover the coal severed from the land, and upon this there can be no doubt, upon the same principle, in an action of trespass, he has the right to recover the value of the coal after it is dug in the bank; or, he could recover the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit.

This rule is founded in justice, and seems to be sustained by the authorities.

In *Martin v. Porter*, 5 M. & W. 352, which was a case in its facts very analogous to the one under consideration, Lord Abinger said: "It may seem a hardship that the plaintiff should have this extra profit of the coal, but still the rule of

law must prevail." Parke said: "I am not sorry this rule is adopted; it will tend to prevent trespasses of this kind, which are generally willful."

In Hilliard on Torts, p. 419, 420, the rule as declared by the author, is: "In trespass, for severing and carrying coal from plaintiff's mine, the proper measure of damages in respect to the coal taken is, its value as soon as it existed as a chattel; that is, as soon as severed." See also *Martin v. Porter*, 5 M. & W. 352.

From these views it follows that the ruling of the circuit court, in the admission of evidence, and in the instruction given for appellee, was contrary to the doctrine here announced, and was error, for which the judgment will be reversed and the cause remanded.

Judgment reversed.

THE McLEAN COUNTY COAL CO. v. LONG.

(81 Illinois, 359. Supreme Court, 1876.)

Trover—Coal in the run—What expense deducted. Defendant, in 1872, sank a shaft on its own land to the depth of 549 feet, and worked its coal bed to and beyond its boundary. Upon defendant's filing certain maps required by statutes in aid of ventilation, in 1873, plaintiff learned for the first time that defendant had worked across bounds, and extracted 610 tons. Plaintiff then demanded this coal which had long since been disposed of. In trover for the coal so taken it was held: 1. That the measure of damages was the value of the coal at the mouth of the shaft less the cost of carriage from the breast where broken, which is only another mode of expressing its value as it lay in the run where it was not salable. 2. That the conversion was complete at the moment of severance. 3. For the expense and trouble of sorting, defendant could not claim to be reimbursed, but for the cost of bringing it to the pit's mouth they should be allowed, because any person purchasing the coal in the pit would have deducted from the price such cost of carriage.

The measure of damages is the same in trespass and trover except where circumstances of aggravation are relied on in trespass.

Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

STEVENSON & EWING, for the appellants.

BLOOMFIELD, POLLOCK & CAMPBELL, for the appellee.

BREESE, J., delivered the opinion of the court.

This was trover, in the McLean Circuit Court by John Long, plaintiff, and against the McLean County Coal Company, defendants, to recover damages for the conversion of a quantity of coals taken from the land of plaintiff.

There is no controversy about the fact of taking and converting the coals, the only question being as to the measure of damages.

The leading facts are, that defendants had in the summer of 1872 sunk and worked a shaft on their own land, three hundred and thirty-three feet west of the west boundary of plaintiff's lots, to the depth of five hundred and forty-nine feet. At the session of the General Assembly held in 1872, an act was passed providing for the health and safety of persons employed in coal mines, in force July 1, 1872, in which it was provided that an accurate map or plan of the workings of each coal mine, showing, among other things, the general inclination of the strata, together with any material deflections in the workings, should be made, and a copy thereof filed in the recorder's office of the proper county: R. S. 1874, Ch. 93, p. 704.

Upon making and filing a map of appellants' mine, appellee discovered for the first time, in 1873, that appellants had worked out of bounds, and, in 1872, taken from his land coals which were found to amount to six hundred and ten tons, from a stratum about two feet thick. When appellee made this discovery, he went to the proper officer of the company and demanded the coal, and on another occasion demanded pay for it. At the time of the demand not a pound of this coal was in possession of the company, it having been sold and disposed of months before. When this demand was made, appellants replied the land did not belong to them and that they were responsible to one Cox.

The action was brought to the February term, 1874.

The controversy was upon the measure of damages. Ap-

pellants' theory was the value of the coal when first it became a chattel; that of appellee, its value in the market; which latter theory the court accepted, and gave, of its own motion, the following instruction:

"The court instructs the jury that if they believe from the evidence, that the defendant wrongfully took and converted to its own use the coal of plaintiff as alleged in plaintiff's declaration, the jury will find the defendant guilty, and assess the plaintiff's damages at the fair market value of the coal at the time the same was sold and converted by defendant to its own use, and to this amount, so ascertained, the jury may, in their discretion, allow interest at the rate of six per cent. per annum from the date of such conversion to the present time."

The jury found for the plaintiff, and assessed the damages at twelve hundred and eighty-one dollars, for which the court rendered judgment, overruling defendants' motion for a new trial, and the defendants appeal.

When this coal was taken to the mouth of the shaft, it was worth at the shaft two dollars and ten cents per ton, and this the jury allowed, no deduction being made for the cost of getting it to the mouth of the shaft—all evidence offered by appellants on this point being ruled out by the court.

Is the rule given to the jury by which to measure the damages a correct rule, having its foundation in reason and authority?

Common observation and reason inform us that these coa's, in their native bed, more than five hundred feet below the surface of the ground, were of no appreciable value; they were made valuable by the labor and expense of appellants; by these, they obtained a market value.

How are the authorities upon this question? *Martin v. Porter*, 5 M. & W. 352, is cited by appellee. That was trespass for breaking and entering plaintiff's close, and breaking and entering a certain coal mine under the close, and taking and carrying away the coal, and converting and disposing of it to the use of the defendant.

The plaintiff claimed that he had a right to hold the defendant liable for the value of the coal when gotten and when first it existed as a chattel, without any deduction for the expense of getting it.

PARKE, Baron, before whom the cause was tried, said that the plaintiff would have been entitled, in an action of trover, to the value of the coal, as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing anything for having worked and brought it there; that not having made such a demand, and the action being trespass, he was entitled to the value of the coal as a chattel, at the time when the defendant began to take it away—that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they, were got, to the pit's mouth.

In the Exchequer, the rule, so given by PARKE, Baron, was held by the whole court as the true rule.

This rule was adhered to in *Wild v. Holt*, 9 M. & W. 671; and also in the Court of Queen's Bench, in *Morgan v. Powell*, 3 Ad. & El. 278.

This question came before this court at the January term, 1874, in *Robertson v. Jones*, 71 Ill. 405, and the same rule was announced. In California the same doctrine is held: *Maye v. Yappen*, 23 Cal. 306. See also, *Moody v. Whitney*, 38 Maine, 174. Other cases might be cited, but it is unnecessary, as this court has recognized the rule as a correct one in *Robertson v. Jones*, *supra*.

But it is said these were actions of trespass, and while the rule may be a just one in such an action, it is not so in trover.

The ordinary principle is, that a party is entitled to recover compensation only for the damage he has actually sustained, no matter what may be the form of action. A different rule of damages does not prevail in trespass for breaking and entering a coal mine and carrying away coals, and trover for the coals, except when circumstances of aggravation are relied on in trespass. The rule is the same in both forms of action: *Mayne on Damages*, 290.

No matter what the form of action, unless it be an action in which vindictive damages, so called, are sought, the jury are restricted to compensation for the pecuniary loss sustained by the plaintiff, and in this case, as these authorities hold, the

estimate of loss depends on the value of the coal when severed from the soil; that is, the price at which the plaintiff could have sold it. This, it is clear, was the value of the coal at the moment it was severed by the defendants and thrown into the run. It was at that moment, when defendants had made it a chattel, exercising control over it, that the conversion was complete. For the expense and trouble of separating it from its kindred layers and making it a chattel, the defendants can not claim to be reimbursed; but the coal had no value, as a salable article, without being taken from the pit, and any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth.

This is, substantially, said by Lord Ch. J. DENMAN in delivering the opinion in *Morgan v. Powell, supra*, and meets our approval.

It follows, from these authorities, the rule given to the jury by which to measure the damages was not the correct rule. During the trial, and whilst the examination of the witnesses was progressing, the court made this statement:

"I can now state what I think the measure of damages is. I understand the measure of damages is the value of the coal at the time of conversion. I think the measure of damages is the value of the coal at the mouth of the shaft, less the expense of drawing it up."

Had the court adhered to this rule, it would have conformed to the authorities, and especially to the decision of this court in *Robertson v. Jones, supra*.

The doctrine announced in the cited cases has received the sanction of this court in *Sturges v. Keith*, 57 Ill. 451, though the subject in controversy was of a different nature. That was trover for certain railroad stocks, which the plaintiff had deposited with defendant, who refused to deliver them on demand. The plaintiff claimed he could select any time at which the stocks were at the highest market value, and recover accordingly; and such had been the ruling of several reputable courts. This court held, as a principle governing this action, that the value of the stocks at the time of the conversion was the measure of damages; and in that case the conversion was established by the refusal to deliver on demand. The princi-

ple is, when the chattel is converted, then the damages are to be estimated.

In this case no demand was necessary, as the taking of the coals was tortious. Then, on the principle of the above cited case, the damages must be computed from the time the coal first became a chattel, for the conversion was complete when defendants severed it and threw it into their run.

The cases in trover cited by appellee are not decisive of this case. We think the authorities above referred to are very satisfactory, and this case is properly settled by them. On the authority of these cases, and they are in harmony with justice, the court should have told the jury the plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft. This is, in effect, saying, he can recover the value of the coal when it first became a chattel by being severed from the mass, and under their control.

For the errors indicated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

ILLINOIS & ST. LOUIS RAILROAD AND COAL CO. v. OGLE.

(82 Illinois, 627. Supreme Court, 1876.)

Mining coal from land of another. In trespass for taking coal from the plaintiff's mine, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging.

Appeal from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

G. & G. A. KOERNER, for the appellant.

C. W. & E. L. THOMAS, for the appellee.

CRAIG, J., delivered the opinion of the court.

ILLINOIS & ST. LOUIS R. R. & C. Co. v. OGLE. 199

This was an action of trespass, brought by David Ogle in the Circuit Court of St. Clair County, against the Illinois & St. Louis Railroad and Coal Company, to recover damages for an unlawful entry upon the plaintiff's close, and digging out a certain vein of coal. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff, to reverse which this appeal was taken by the defendant.

The only error assigned is, that the court erred in instructing the jury in regard to the measure of damages, as follows:

"If the jury believed from the evidence, that the defendant trespassed upon plaintiff's land, and mined coal therefrom, and converted it to its own use, the jury are to be in no wise limited by the value of the land itself, but must regard the instructions of the court upon the question of what is the proper measure of damages.

"If the jury believe from the evidence, that the defendant, by its servants and employes, mined coal from the plaintiff's land without his consent, as alleged in the declaration, and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land within five years before this suit was commenced, estimated at the pit mouth, less the cost of carrying it where it was dug to the pit mouth; or, in other words, the plaintiff, under the above circumstances, is to be allowed the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging; the verdict, however, not to exceed \$65,000."

In *Robertson v. Jones*, 71 Ill. 405, the same question presented by the instructions of the court in this case arose, and we there held, in an action of trespass, the owner of the mine could recover the value of the coal as soon as it was severed and became a chattel, or he might recover the value of the coal at the mouth of the pit, less the cost of removing it from the mine, after it was dug, to the pit's mouth.

The instructions given are in harmony with the views expressed in *Robertson v. Jones*, but it is urged by appellant that a different rule has been established in other courts, and our attention is called particularly to *Wood v. Morewood*, 3 Q. B. 440;

Forsyth v. Wells, 41 Pa. St. 291; and the late case, in Michigan, of *Winchester v. Craig*, decided at the January term, 1876, 33 Mich. 205.

The decision in *Robertson v. Jones*, *supra*, although in harmony with other authorities, is predicated mainly on the decision of *Martin v. Porter*, 5 M. & W. 353, which, like the case before us, was an action of trespass for breaking and entering the plaintiff's close and carrying away coal, by an owner of an adjoining estate. On motion to reduce the damages before a full bench, it was held that the plaintiff was entitled to recover the value of the coal as soon as it existed as a chattel, which would be its value at the mouth of the pit after deducting the expense of carrying the coals from the place in the mine where dug, to the pit's mouth.

This decision was rendered in 1839. In 1841, *Wood v. Morewood*, *supra*, was tried at the Derby Summer Assizes, before Baron Parke, and on the trial the Baron directed the jury: "That if there was fraud or negligence in the defendant, they might give as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought that the defendant was not guilty of fraud or negligence, but acted honestly and fairly, in the full belief he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff."

This decision is cited by appellant as authority that the rule announced in *Martin v. Porter* was not adhered to in the courts of England; but the fallacy of the position is fully established by the decision of *Morgan v. Powell*, 43 Eng. Com. L. 734, which was an action of trespass for entering the plaintiff's close, and mining and carrying away coal. On a rule before Lord DENMAN, PATTERSON, WILLIAMS and COLRIDGE, JJ., to show cause why the expense of mining and carrying the coals from the mine to the mouth of the pit should not be deducted from the verdict, Lord DENMAN said: "We are of opinion that the rule in *Martin v. Porter* is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his

coal, compensation having been separately given for all the injury done to the soil by digging, and for the trespass committed in digging the coal along the plaintiff's adit, and the estimate of that loss depends on the value of the coal when severed; that is, the price at which the plaintiff could have sold it. This, plainly, was the value of the coal at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article, without being taken from the pit. Any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be supposed where particular circumstances would vary this mode of calculating the damage, but none such appear."

In the argument, the case of *Wood v. Morewood*, decided at *Nisi Prius* by Parke, B., was cited, and relied upon as establishing the correct rule of damages, yet the court in no manner alluded to that decision, but on the other hand, followed and affirmed *Martin v. Porter*.

The doctrine announced in *Martin v. Porter* was again followed and adhered to in the case of *Wild v. Holt*, 9 M. & W. 672.

So far, therefore, as we understand the English authorities, in an action of trespass like the case under consideration, the rule of damages is well settled that the plaintiff is entitled to recover the value of the coal at the mouth of the pit, after deducting the cost of removing it from the place where mined, to the pit's mouth.

No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept, and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken.

It is true a different rule was established in *Forsyth v. Wells, supra*, cited by appellant; but that case seems to be predicated upon what was said in *Wood v. Morewood, supra*, which, as we have attempted to show, can not be regarded as the doctrine of the English courts. The doctrine announced in the Michigan case cited by appellant, in so far as the question here involved is discussed, seems to follow the rule announced in the case cited from Pennsylvania, which we are not inclined to adopt.

The same question involved in this case, in 1873 came before the Supreme Court of Maryland, in *Barton Coal Co. v. Cox*, 39 Md. 1. The action was trespass to recover damages for mining and carrying away coal. The court, after a thorough and able review of the authorities bearing upon the question of the correct rule of damages, approved and followed the rule announced in *Martin v. Porter, supra*. In the concluding part of the opinion bearing upon the question, it is said: "The necessity and importance of this rule can scarcely be magnified in a community where the wealth of the country consists in its mineral deposits."

It is true the authorities in the States are not entirely harmonious, but we are satisfied the rule announced in *Robertson v. Jones* is correct in principle, that it is in harmony with the rule adopted in England and in most of the States, and we perceive no reason for departing from the doctrine announced.

Believing that the instructions of the circuit court are correct, the judgment will be affirmed.

Judgment affirmed.

MEEKER ET AL. V. THE CHICAGO CAST STEEL COMPANY.

(84 Illinois, 276. Supreme Court, 1876.)

Approximation of values. In trover for the conversion of steel ingots, there was no direct proof of their market value at the time of the conversion, but it was proved that steel made from such ingots was worth a certain sum per pound, and how much it would cost to convert the ingots into merchantable steel. *Held*, that the proof furnished sufficient data to en-

able the jury to approximate the value of the ingots, by taking the cost of converting them into steel from the market value of merchantable steel.

¹**Corporate existence, how tested.** The regularity of the organization of a corporation can not be questioned in a collateral way. If franchises not granted by statute have been usurped, the inquiry must be made by a direct proceeding to seize the franchises to the people and dissolve the corporation.

Constitutional construction. Section 1, of article 11 of the constitution of 1870, construed as not repealing the general law on the subject of private corporations previously in force in Illinois.

Appeal from the Circuit Court of Cook County; the Hon. HENRY BOOTH, Judge, presiding.

FREDERIC ULLMAN, for the appellants.

GARDNER & SCHUYLER, for the appellee.

BREESE, J., delivered the opinion of the court.

This was a case in the Circuit Court of Cook County, in trover for four hundred and eleven cast steel ingots, brought by the Chicago Cast Steel Company, plaintiff, and against Arthur B. Meeker and William L. Brown, defendants. There was a trial by jury, on the plea of not guilty, and of *null tiel corporation*, which resulted in a verdict for the plaintiff, and the damages assessed at thirty-two hundred dollars. A motion for a new trial was denied, and judgment rendered on the verdict, to reverse which the defendants appeal.

Appellants make as their principal point, the absence of legal and competent evidence to sustain the verdict, and herein is involved the ruling of the court in admitting evidence of the value of the ingots. Law is not one of the exact sciences, nor can damages sued for be measured by mathematical rule. Approximation is all that can be attained. Here, no witness testified to the market value of steel ingots at the time of the alleged conversion, but evidence was given to the jury from which they had a right to draw their own inference of value. There was no market value of ingots at the time of the con-

¹ *Cozell v. Colorado Springs Co.*, 100 U. S. 55; *Humphreys v. Mooney*, 4 M. R. 76.

version of these in controversy, but it was proved that steel made from these ingots was worth a certain sum per pound in market, and then it was proved how much it would cost to convert the ingots into merchantable steel. Taking this cost from the market price of merchantable steel, gives a fair approximation of the value of the ingots. Data were furnished the jury from which they would be able to determine the value of the ingots. Their determination will not be disturbed.

The point argued under the plea of *nul tiel corporation* is not much pressed by appellants. It has been settled by repeated decisions of this court, that the regularity of the organization of a corporation can not be questioned in a collateral way. If franchises not granted by statute have been usurped, the inquiry must be made by a direct proceeding to seize the franchises to the people and dissolve the corporation: *Rice v. Rock Island R. R.*, 21 Ill. 95; *Goodrich v. Reynolds*, 31 Ib. 490. We are of opinion, section 1 of article 11 of the constitution of 1870 did not repeal, and was not designed to repeal the general law on the subject of private incorporations in force prior to the adoption of the constitution, and all incorporations framed under such law after the adoption of the constitution are valid and effectual.

Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

HANOVER WATER CO. v. ASHLAND IRON CO.

(84 Pennsylvania State, 279. Supreme Court, 1877.)

Diversion of stream used to wash ore. The measure of damages for the diversion of a stream whereby a farm with an ore bank thereon is injured, is the difference in the market value of the property as a farm and ore bank immediately before the diversion of the stream, and immediately afterward as affected thereby, without reference to the fact that the water of the stream was formerly used, or might hereafter be required for use in washing the ore obtained from the ore bank.

Competency of witness as to value of land. Witness stated generally that he owned land in the neighborhood, and was acquainted with its mar-

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ket value; that he knew the general value of ore land in the neighborhood; knew the tract in question, and it had on it an ore bank, but his knowledge of sales was derived from hearsay, and he had no practical knowledge of ore land never mined. *Held*, that his opinion was competent evidence to aid in determining the value of the land.

Assessments for taxes are not competent evidence to aid a jury in determining the value of land.

¹**Unauthorized declarations of agent, not evidence.** S. was acting for an iron company in carrying on their work at their ore bank, and an offer was made to prove a statement he had made to ore miners in reference to the cost of mining the ore per ton. *Held*, that this declaration was not within the scope of his authority as superintendent, and was incompetent.

Error to the Court of Common Pleas of York County.

The parties to this action as they stood on the record of the court below, were the Ashland Iron Company, plaintiff, and the Hanover Water Company, defendant. The action was instituted by the presentation to the Court of Common Pleas of York County, on the 7th of September, 1874, of a petition for the appointment of viewers to assess damages alleged to have been sustained by the plaintiff on account of the construction of the works of the defendant. Both parties appealed from the report of the viewers, and on the 30th day of August, 1875, the court directed an issue to be framed in the case by treating the petition for the appointment of viewers to assess damages presented by the plaintiff as a declaration, the defendant to plead "not guilty," and the cause to be tried on the issue formed on such pleadings, without regard to the form of action.

The petition of the plaintiff set forth that the Ashland Iron Company was a corporation duly incorporated under the laws of Maryland, and authorized by acts of assembly of the State of Pennsylvania, to take and hold land in Pennsylvania, in fee simple, or otherwise; that it was, and had been for six years, the owner of a tract of land in Heidelberg township, York county, containing about twenty-four acres, more or less, further described by named adjoiners; that there was in and upon said tract of land a large and valuable bank of iron ore; that a considerable stream of water had always flowed by its natural channel in, over, upon and across said tract of land,

¹ *Alexander v. Cauldwell*, 5 M. R. 650.

until diverted as in said petition further set forth; that said stream of water afforded the petitioners a water-power of great value to them; that they were enabled by its use to propel their machinery-used in mining and preparing and washing their ore, and to wash and prepare said ore for smelting; that the defendant had erected a dam on said stream at a point above where it had always been accustomed to enter the petitioner's land, and had wholly diverted the water from its accustomed flow by the natural channel aforesaid, and prevented its flow into and over the petitioner's land, whereby they were entirely deprived of the use of said water for propelling their machinery or washing their ore, or watering the stock on their land, to the great damage of the petitioners; that the said land was chiefly valuable as an ore property, for the purpose of mining iron ore, and that the petitioners averred and believed that said iron ore could not be profitably mined without the use of said water in its former accustomed flow; that the defendant, by its servants and employes, had entered upon said tract of land and made extensive excavations therein, and laid pipes therein, to the great damage of the petitioners. They alleged that they could not agree with the Hanover Water Company upon the amount of compensation to be paid to them for said damages, or upon three disinterested and competent persons to assess the damages, and prayed the court to appoint three such men, to ascertain and report to the court what damages the petitioners were legally entitled to recover from the said Hanover Water Company, by reason of the acts and matters alleged in the petition, and what compensation should be paid to them therefor by the said water company.

At the trial, before FISHER, P. J., to show that the ore bank was not abandoned, and the reason why it was not worked all the time, the plaintiffs offered to prove, first, that the bank being owned by them in fee simple, it was held in reserve, and that they worked their leased banks, first, as the leases thereon would expire; second, that while there was no formal resolution of the board of managers to that effect, the matter was frequently talked about at their meetings, and was assented to by all the managers present, and that this policy was carried out by the company's superintendent; and, third, this bank the company so held in reserve as one of their best banks in York county.

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The court admitted the evidence under these three offers which constituted the first, second and third assignments of error.

Becker, a witness for defendant, testified that he owned lands and was acquainted with the general market value of lands in the neighborhood.

The defendant then offered to prove by him "that the and of the plaintiff, on which this ore bank is located, was worth as much when, and immediately after the defendant's dam was, built, as it was immediately before, for the purpose of enabling the jury to assess the damages."

The court rejected this evidence, as stated in offer, because the greater portion of plaintiff's claim was for an alleged deprivation of their ore land of the water used for washing, by the erection of the Hanover Water Company's dam, and the witness, by whom the facts stated in the offer were to be proved, had not shown such acquaintance with the value of ore land as would enable him to give an intelligent answer. The court, however, allowed the defendant to prove the general value of lands of this character in the vicinity for farm lands, or both together, or any other value which he was acquainted with.

This was the fourth assignment.

Becker then testified: "I know the general value of ore lands in the neighborhood; know the tract in question. I know it has on it an ore bank."

Defendant then proposed to prove by witness on stand that the ore bank property of the plaintiff was worth as much at and immediately after the building of the defendant's dam as it was before, for the purpose of enabling the jury to assess the amount of damages, if any, sustained by the plaintiff.

Upon objection the court asked the witness what was his knowledge, or his means of knowing the value of the ore lands in 1872 to 1873.

The witness answered: "I know what they were sold at but can't tell the date; I know the price they were sold for when iron was high; Eichelberger sold his land, ten acres, for \$4,000, if I am not mistaken; Kauffman bought from Miller as Miller said, for \$4,500, if I am not mistaken; I can't state, I suppose about five acres is the quantity; I was on those

tracts ; I know nothing of these sales ; was not along when they were sold ; only know from hearsay. I have no practical knowledge of ore land now mined."

The court rejected this evidence because the witness had not sufficient knowledge of the value of ore lands to give an opinion, which was the fifth assignment.

Defendant then offered to prove that the tract of land owned by plaintiff, through which the stream of water, known as "Gitt's run," for the alleged diversion of which by the defendant the plaintiff seeks to recover damages in this suit, flows, was assessed by the assessor for taxes in that township in the fall of 1872, at \$1,400 for the tract of land and \$600 for the ore bank thereon, and that plaintiff paid taxes on that assessed valuation for the purpose of enabling the jury to ascertain the value of said tract of land and ore bank at the time when the alleged damage, if any, was sustained, and to assess the amount of damages, if any, sustained by the alleged diversion of water.

Also, the assessment books of Heidelberg township, for the years 1871, 1872 and 1873, in evidence for the purpose of showing that the property was assessed at a valuation of \$1,400, and the ore bank itself at \$600, to be followed by proof by witness on the stand and others, that plaintiff paid taxes for said property on the amounts of said assessments; this for a like purpose.

The court rejected both these offers, which were the sixth and seventh assignments.

Witness on the stand having testified that Philip A. Small was carrying on the work for the Ashland company, and Samuel Small having testified that his brother, Philip A. Small, in attending to the bank, was acting for the Ashland company, the defendant offered to prove by the witness that he had a conversation with P. A. Small, at the Porter ore bank, when it was in operation in 1863, and P. A. Small was carrying it on for the Ashland company, when he told the witness that every ton of ore they got out there cost a little over five dollars a ton to mine it, for the purpose of enabling the jury to assess the damages.

The court rejected this evidence on the ground that it did not appear that the alleged declaration of P. A. Small was in

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the line of his duty as superintendent and agent of the company, if he was superintendent or agent.

This was the eighth assignment.

The plaintiff's first point was :

That the supply pipe leading from the reservoir to the borough of Hanover is an appropriation of all the water that can be conveyed through said pipe and used, and amounts to an appropriation of such an amount of water, and the defendant must respond in damages to the plaintiff for the value of all the water that will pass through said pipe, even to the extent of the whole stream, if the pipe will convey it ; and particularly is this the case, as the defendant has refused to designate the quantity of water appropriated by it, in answer to rules on it to do so, on file in this case.

Answer. "This point is correct."

The defendant's third point was :

That the fact, if found by the jury, that the plaintiff has not operated its ore bank, nor used the water of the stream flowing through its property for the purpose of driving a washer or washing ore during the last eleven years, of which a number preceded the building of its dam by the defendant, should be taken into consideration by the jury in mitigation of damages, if they should find that the plaintiff has sustained any perceptible, actual, direct and immediate damages, which can only be allowed in this case.

Answer. "We can not answer this proposition in the affirmative, but we instruct the jury that the measure of damages is the difference in the market value of the property of the plaintiff as a farm and ore bank, immediately before the diversion of the water by the defendant and immediately after, as affected thereby ; and that if the plaintiff reserved the Porter ore bank for future use, because they held it in fee, and worked others, which they had leased and were to pay rent for whether they mined them or not, the fact that they did not work the Porter mine for some years is explained, and ought not to prejudice the plaintiffs."

The answers to these points were the ninth and tenth assignments.

The verdict was for the plaintiff for \$3,200, and defendant

took this writ, the assignments of error being those heretofore noted.

COCHRAN & HAY and W. C. CHAPMAN, for plaintiff in error.

J. W. LATIMER, DAVID WELLS and V. K. KEESEY, for defendant in error.

SHARSWOOD, J., delivered the opinion of the court.

The rule for the measure of damages was correctly stated by the learned judge below, that it was the difference in the market value of the property of the Ashland Iron Company as a farm and ore bank immediately before the water company appropriated the stream and immediately afterward as affected thereby. It is true that the first point of the plaintiff below was inaccurately worded, and the unqualified affirmance of it might have misled the jury if it had stood alone, to think that the measure of damages was the value of all the water that would pass through the pipe, even to the extent of the whole stream. But the meaning evidently was, that as the iron company might have the whole stream taken from them at any future period, and their damages were now to be ascertained and found once for all, the jury had a right to consider that fact in its legitimate bearing upon the market value of the land and ore bank. If this stream of water added greatly to the value of the property, as the jury might well find, certainly the fact that it might at any future period be exhausted by means of the pipe laid to convey it to the borough of Hanover, would necessarily operate to depreciate its market value. Upon another trial this apparent error can and ought to be avoided.

It appears to have been apprehended that the water company would insist that the ore bank had been abandoned, and the stream therefore of no use for the purpose of washing the ore, and such ground they did in point of fact take. Now it was entirely competent for the iron company to prove that though it had not been worked for a number of years, it was not exhausted, and the working of it might be resumed with profit whenever they determined to do so. But why

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they had abandoned it, if it was still unexhausted and workable, was entirely irrelevant, not calculated to enlighten the jury upon the only true issue, but on the contrary to turn aside their attention to side issues. What the intention of the owners in the future might be, could have no legitimate bearing upon the question of the value of the land and ore bank in the market, immediately before or after the appropriation of Gitt's run by the water company. We think, therefore, that the first, second and third assignments of error must be sustained.

The rejection of the evidence as complained of in the fourth assignment may be supported. The witness Becker had stated generally, that he owned land in the neighborhood, and was acquainted with its market value. When asked the value of this land, it was objected that the greater portion of the claim of the iron company was for an alleged deprivation of their ore land of the water for washing, and the witness therefore could not speak of the value of this land from the bare knowledge of the value of farm land in the vicinity. But the witness then testified that he knew the general value of ore lands in the neighborhood; that he knew this tract, and that it had on it an ore bank. Why then should he not have been allowed to give his opinion? It is true, he said, in answer to questions by the court, that his knowledge of sales of ore land was derived only from hearsay, and that he had no practical knowledge of ore lands never mined. The knowledge that the best experts possess upon this subject is derived from hearsay. It is not necessary that they should be actually present, and personally know the sale. Indeed, it was held by this court, in *East Penn. R. R. v. Hiester*, 4 Wright, 53, that after a witness has given his opinion of the value of land, it was improper for him to give particular instances, because there might thereby be introduced into the cause as many issues as there were instances. We think, therefore, the fifth assignment of error must be sustained.

We find no error in the rejection of the assessments. It is true, the assessors and public officers are sworn to do their duty. But the assessment is nothing but their *ex parte* statement, and their opinion was not subjected to the test of a cross-examination. The sixth and seventh assignments, therefore, are not sustained.

Nor do we think that the declaration of Philip A. Small was admissible. It was testified, indeed, that he was acting for the iron company, in carrying on the work at the bank, and the offer was to prove a statement by him to one of the miners, "that every ton of ore they got out there cost a little over five dollars a ton to mine it." This was certainly not within the scope of his authority as superintendent, and it would be very unjust to allow such loose declarations of a mere agent to affect his principal. It was no part of the *res gestæ* upon the broadest construction of the rule which admits the acts and declarations of an agent. Such acts and declarations must be in the course of his duty.

The ninth assignment has been already adverted to and needs no further examination. As to the tenth, the answer to the third point of the defendant below was in part erroneous, in introducing the element of the intention of the iron company to remove the ore bank, the evidence as to which was, as we have seen, irrelevant, and ought not to have been admitted; but it would have been correct to say that the fact that the mine was not worked ought not of itself to prejudice the iron company, if it was still an unexhausted mine, and added to the market value of the property.

Judgment reversed and venire facias de novo awarded.

EGE ET AL. V. KILLE ET AL.

(84 Pennsylvania State, 333. Supreme Court, 1877.)

Bona fide claimant liable only for value of ore in place. In trespass for mesne profits, arising from ore lands, it appeared that the defendants were *bona fide* purchasers for value, and in possession under color of title. At the time they took possession, the mines were unimproved, and defendants expended large sums of money in their development, and made permanent improvements of great value thereon. *Held*, that having acted in good faith in the working of the mines and removal of the ore, they were chargeable only with the value of the ore in place.

The value of the ore in place is to be ascertained by deducting the cost of mining, cleansing and delivering the ore in market, from its market value, thus delivered.

Improvements as compensation for use of premises. The action for mesne profits is an equitable one, and hence a *bona fide* occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises.

¹**Machinery of ore-bank, part of realty.** Whether fast or loose, all the machinery of an ore-bank which is necessary to constitute it such, and without which it would not be an ore-bank equipped and ready for use, is a part of the freehold, and passes with the realty.

¹**Effect of recovery in ejectment as to fixtures.** By their recovery in ejectment, of the lands, the plaintiffs recovered all the fixtures put there by the defendants or their lessees, and by the writ of *habere facias possessionem* were put in possession thereof. The right of defendants to their equitable defense, viz., that the fixtures were full compensation for the use of the premises then became determined, and this right could not be impaired by the plaintiffs afterward permitting the former lessees of the defendants to remove a portion of the machinery.

Statement sent out with jury. It was not error, where there was evidence of increased value to the premises by reason of the machinery and improvements, to permit the defendants to send out a statement with the jury.

Error to the Court of Common Pleas of Cumberland County.

Trespass for mesne profits by the heirs of Elizabeth Ege, deceased, against John T. Kille and Charles Wharton.

The land of which the mesne profits were claimed, was recovered by the plaintiffs from the defendants, in an action of ejectment brought 7th June, 1872, in which a verdict in their favor was rendered, 16th October, 1874. On the 26th October, 1874, the plaintiffs were put into possession of the premises under a writ of *habere facias possessionem*. In the ejectment John T. Kille defended as landlord.

The action of ejectment was originally begun by the heirs of William Cox, deceased, who on the trial were nonsuited. The heirs of Elizabeth Ege, deceased, who recovered the verdict and judgment in that case, did not come upon the record as parties plaintiff until 24th April, 1874, from which time only did the action commence as to them. See *Kille v. Ege*, 1 Norris, 102.

The plaintiffs in this suit sought to recover mesne profits from November, 1869, down to the execution of the *habere facias*, or for the time anterior to the 24th of April, 1874.

¹ *Coombs v. Beaumont*, 5 B. & Ad. 72.

² *Kille v. Ege*, 82 Pa. St. 102; *Post RENTS*.

and the profits claimed were those derived from the ore mined and carried away by the defendants and their lessees.

It was shown that the title to the land was in the plaintiffs for and during the time for which the mesne profits were sought to be recovered.

The trial was had before HERMAN, P. J. Twenty assignments of error were made to the admission of evidence, on the trial, to the answers to points and the charge of the court. The principal questions involved were as to the value of the ore taken, the manner of proving that value, and the character of the improvements, which might be recouped or set off against the value of the ore mined and appropriated by defendants; and for convenience the assignments, as they bear upon these questions, have been grouped together:

1. To fix the value of the ore in place, and to prove its value.

Henry Guiterman, a witness on the stand, having stated that he was one of the lessees of the Guiterman & Robertson Bank, that he managed it by and through a superintendent, the usual way of managing banks, that he sent to his superintendent, from time to time, money for the expenses of the bank, in accordance with amounts shown by pay roll sent by the superintendent, and that by means of an examination of the pay rolls and the amounts he paid for the expenses of the bank, he can state whether or not he operated the bank at a profit or loss over and above what he received from the sales of the ore, the defendants proposed to ask the witness whether or not he operated the bank at a loss, and if so, what loss, and at what expense per ton he mined the ore, together with an exhibition of the pay rolls and his account of expenses and receipts.

Under objection admitted, which was the first assignment.

Defendants proposed to prove by John T. Kille, one of the defendants, the amount of money he paid in developing the ore upon this property, recovered by the plaintiffs in the ejectment, and in taking out the ore for which he has made return in this case, showing the gross amount received for the same, to be followed by the evidence of the parties to whom he made the payments, that the money was expended for the purpose set forth alone, and this for the purpose of showing

the increased value of the property by reason of this development, and that the ore taken out by the defendants was more than paid for by such development.

Under objection admitted, and fourth assignment.

The defendants also offered the pay rolls referred to by the witness Haskell, the agent of Kille, in connection with the testimony of the witness, for the purpose of corroborating his statement as to the cost of mining the ore, and of showing how the money sent to him by Mr. Kille was expended.

Admitted under objection and fifth assignment.

The sixth point of the plaintiffs was:

"The value of the ore in place is the royalty, which responsible parties, competent to judge of the value, would be willing to pay for the privilege of mining it."

The court answered as follows, which was the thirteenth assignment:

"This point is refused. The value of the ore in place is ascertained by deducting the cost of mining, cleansing and delivering the ore in the market, from the market value of the ore delivered in the market; the difference is its value in place."

The eighth point of plaintiffs was:

"If the jury believe that John T. Kille, one of the defendants, was not skilled in mining ore; that he gave no personal attention to the mining operations; that the prices paid by him for superintending those operations, viz., \$200 per month to Charles Wharton, and \$1,000 per year to E. F. Haskell, were extravagant and unnecessary; that the gross amount of his expenditures was greatly above the legitimate cost of opening and working the mines on plaintiffs' lands, then little if any weight should be given to the evidence of the amount expended by him, and it should be so regarded by the jury in ascertaining the real or legitimate cost of mining, or the value of the ore in place."

The court answered as follows, which was the fourteenth assignment:

"We decline to answer this point as requested. If, however, you find the facts to be as therein stated, then you should so consider the evidences of the amount expended by Kille as that. No extravagant or unnecessary expenditures but only such, or so much thereof, as are proper and legiti-

mate expenditures, should be taken into account in ascertaining the real or legitimate cost of mining, or the value of the ore in place."

The defendants' first point was:

"The royalty named in the leases given in evidence in this case is not the absolute measure of the value of the ore in place on the lands of the plaintiffs, but is a measure of such value only in connection with the location of the lands and their natural surroundings."

The court affirmed this point, which was the 15th assignment.

The following portion of the general charge was the 20th assignment:

"The value of the ore in place you will ascertain by estimating the cost of mining, cleansing and putting the ore into market, and then deducting this cost from the value of the ore in the market; the difference will be the value in place."

In regard to the character of the improvements, defendants proposed to prove the value of the machinery attached to and used in connection with the ore banks in the lease as a measure of the value of the improvements to the property, for the purpose of enabling the jury to judge of and fix the value of such improvements to the property, and of their permanent character, and to show the necessary conveniences and machinery required in mining the ore.

Admitted under objection, and 2d assignment.

The 3d assignment was to the refusal of the court to permit the plaintiffs to ask a witness whether or not he was disturbed in the possession under their lease, by these plaintiffs.

The 6th assignment, the refusal of the court to permit plaintiffs in rebuttal to prove that Guiterman and Robertson, lessees of the defendant Kille, since the recovery of the land by the plaintiffs and since the execution of the *habere facias*, did, on March 7, 1876, and on March 10, 1876, take away from the Guiterman and Robertson bank two car loads of machinery, consisting of engines, pumps, pipes, boilers, etc., and that this was done without objection by the plaintiffs and under the terms and conditions of their lease with Kille, as accepted by the plaintiffs on the attornment of said lessees; this to show that the fixtures, machinery and property connected

with the ore bank did not change its character (of the time of the possession under Kille), when the writ of *habere facias* was executed; and the defendants should not be permitted to claim the same as permanent improvements, passing with the land.

The plaintiffs' third point was:

"The plaintiffs are entitled to recover from the defendants in this case, as damages, the value in place of all the ore, timber, etc., taken from the Cox tract by the defendants, or by their lessees, with interest from the time it was taken; and the defendants are entitled to credit, against that value of the ore, only for such improvements put upon plaintiffs' land by defendants or by their lessees, as the jury believe are of a lasting and permanent character, adding a permanent increase of value to the land and being of lasting or permanent benefit to it."

The 11th assignment was the court's answer, which was:

"This point is answered in the affirmative, and we instruct you as requested, and in addition say to you in explanation, that improvements are of a lasting and permanent character when they are annexed to and made part of the freehold and give an increase of value to it. The increase is a permanent increase if the value of the land has been increased by the permanent improvements made or put upon it; and if such improvements have increased the value of the land, they are a lasting and permanent benefit to it."

The 5th point of the plaintiffs was:

"If the jury believe that the machinery, buildings and conveniences for mining ore, put by the lessees of the defendants upon the land of the plaintiffs, were for temporary use only, and not structures of a lasting and permanent character, then they are not such improvements as entitle defendants to credit against the plaintiffs' demand in this action."

The qualification contained in brackets in the following answer to this point was the 12th assignment:

"We answer this point in the affirmative and so instruct you. If you believe the machinery, buildings and conveniences for mining ore were for temporary use only, and not structures of a lasting and permanent character, then they are not such improvements as entitle defendants to credit against

the plaintiffs' demand in this action. [And we do instruct you that they are structures of a lasting and permanent character, if they are annexed to and made part of the freehold and give an increased value to it."]

The defendants' fifth point was:

"The engines, boilers, washers, planes, drums, pumps, ropes, cars and all other matters necessary to convert unimproved land into ore banks opened and ready to operate as such, are permanent improvements to the property, whether they will last a limited number of years or not, and the defendants are entitled to the difference in value between the property as it was without them, and as it was when the plaintiffs were put in possession of it, on October 26, 1874, with them, in its distinctive character as ore banks ready to operate, as a defense to the value of the ore in place and before it was taken from the ground."

The 16th assignment was the following answer of the court to this point:

"In answer to this point, we instruct you that the engines, boilers, washers, planes, drums, pumps, ropes, cars and all other matters necessary to convert unimproved land into ore banks, opened and ready to operate as such, are permanent improvements to the property, whether they will last a limited number of years or not, provided they be necessary parts of the machinery and fixtures erected and put upon the land for that purpose, and provided also such machinery and fixtures were annexed to the freehold and made part of it, and give an increased value to the land. And if, therefore, you find these things to be permanent improvements giving increased value to the land, the defendants will be entitled to the difference in value between the property as it was without them, and as it was when the plaintiffs were put in possession of it on October 26, 1874, with them, in its distinctive character as ore banks ready to operate, as a defense to the value of the ore in place and before it was taken from the ground; just to the extent, however, that such difference of value was produced by such improvements made and put upon the premises by the defendants and their lessees."

The 17th assignment was to the affirmance by the court of the sixth point of the defendants, which was:

"Whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such, and without which it would not be an ore bank equipped and ready for use as such, are a part of the freehold, and the recovery of the land by the plaintiffs in the action of ejectment gave to them the ore banks on it with all the machinery, whether fast or loose, and necessary to constitute them such, equipped and ready for use."

The 19th assignment was to the leave given by the court to the defendants to send out with the jury a statement which, by its highest estimate, allowed the plaintiffs \$17,394.23, being for 30,249.12 tons of ore, at 50 cents per ton, with interest from November 1, 1874, against which the defendants claimed \$17,222.20 as the average value of the improvements, or \$21,666.67 as average increased value by machinery and development of ore, to the property as ore banks. This statement was also accompanied by a list of the various improvements made to the several ore banks.

The verdict was for the plaintiffs for \$1,839.30, and judgment was entered thereon. The defendants took this writ, the errors assigned being those noted before.

S. HEPBURN, Jr. and S. HEPBURN, for plaintiffs in error.

L. TODD and JOHN HAYS, for defendants in error.

MERCUR, Justice, delivered the opinion of the court.

This was an action of trespass for mesne profits. Twenty errors are assigned. It is unnecessary to consider each separately. They involve a few principles only. The controlling questions are, the value of the ore taken, the manner of proving that value, and the character of the improvements which may be recouped or set off against the value of the ore mined and appropriated by and under the defendants.

1. The evidence shows the defendants were *bona fide* purchasers of the land, for value, and were in possession under color of title when the trespasses were committed. At the time they took possession the mines were unimproved. They expended large sums of money in their development. They made permanent improvements of great value. Having

acted in good faith in the working of the mines and in the removal of the ore, they should be chargeable for the latter only with its value in place: *Forsyth v. Wells*, 5 Wright, 291; *Herdie v. Young*, 5 P. F. Smith, 176; *Coleman's App.*, 12 Id. 252.

2. Ore leave, or the right to dig and take ore, can have no general market value. Its value depends on the position and circumstances of each particular mine, on the quality of the ore, the cost of mining and preparing it for market, its proximity to the places where it is to be used and on the facilities for transportation: *Coleman's App.*, *supra*. Hence there was no error in the court charging, as it did substantially, that the value of the ore in place was to be ascertained by deducting the cost of mining, cleansing and delivering the ore in market from its market value thus delivered, the difference being its value in place. Those costs and expenses only which are reasonable and necessary, should be deducted from the gross receipts. The court very correctly said to the jury, "no extravagant or unnecessary expenditures, but only such, or so much thereof, as are proper and legitimate expenditures, should be taken into account in ascertaining the real or legitimate cost of mining, or the value of the ore in place."

We discover no error in the mode of proving the necessary costs and expenses of operating the mines. Due regard should always be had to the usual and ordinary manner of conducting the particular business in question. Each branch of industry has its usages and its practices. The work of mining is one of magnitude. It requires the employment of many men. Laborers, overseers, superintendents and operatives, must perform their allotted parts. The keeping of a pay roll is a usual and convenient practice. It furnishes a prompt and concise method of making a daily record of current expenses. Confirmed, as its correctness was in this case, by the testimony of the operator and superintendent, it was clearly evidence proper to submit to the jury of the sums expended in operating the mines. Its effect was properly guarded and restricted by the learned judge.

3. The action for mine profits is equitable in its character: *Morrison v. Robinson*, 7 Casey, 456; *Zimmerman v. Esh-*

bach, 3 Harris, 417; *Kille v. Ege*, 1 Norris, 102. Hence a *bona fide* occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises: *Morrison v. Robinson*, *supra*; *Kille v. Ege*, *supra*.

The criterion of a fixture depends on the business for which the premises are used. A fixture in a manufactory, mill or colliery may have no adaptation to many other kinds of business. Although not attached, yet, if it be designed for the convenience of trade on the premises, and be so used, or subject to be called into use at any time, it becomes a fixture. If the article is indispensable in carrying on the specific business it becomes a part of the realty: *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, Id. 390. This rule, however, does not prevent a tenant who erects fixtures for the benefit of his trade or business, from removing them from the demised premises within his term. The question here is between persons who were hostile claimants to the land. As between them, all the machinery and implements necessarily used in working the mines became a part of the realty. There was therefore no error in the court charging "whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such, and without which it would not be an ore bank equipped and ready for use as such, are a part of the freehold, and the recovery of the land by the plaintiffs in the action of ejectment gave to them the ore banks on it, with all the machinery, whether fast or loose, necessary to constitute them such, equipped and ready for use." That some machinery was essentially necessary to raise the ore and prepare it for market is very manifest. It was therefore proper to show what machinery was actually used for that purpose, and to submit its necessity and value to the jury. The evidence was rightly received.

The defendants are entitled to an allowance for such improvements only as are of a lasting and permanent character, and which gave a permanently increased value to the land. This is substantially the third point submitted by the plaintiffs and affirmed by the court. We see no error in the qualification that the increased value may be of limited duration. In answer to the plaintiffs' fifth point, the court said, if they "were

for temporary use only, and not structures of a lasting and permanent character, then they are not such improvements as entitle defendants to credit against the plaintiffs' demand." An examination of the answers to the numerous points presented to the court fails to discover any error. All questions relating to the permanency of improvements and of value to the premises were correctly answered.

By the recovery of the land the plaintiffs also recovered all the fixtures thereon, put there by the defendants or their lessees. By the execution of the writ of *habere facias possessionem* the plaintiffs were put in possession thereof. Right of property and actual possession were thus united in them. The right of the defendants to their equitable defense then became fixed. That right could not be impaired by the plaintiffs afterward permitting the former lessees of the defendants to remove a portion of the machinery. Such a voluntary relinquishment by the plaintiffs of their property, to those having no right thereto, either with or without consideration, could not affect the rights of the defendants, who were not a party to the transaction.

Inasmuch as there was ample evidence of increased value to the premises by reason of the machinery and improvements, the court committed no error in permitting the defendants to send out a statement with the jury: *Blight's Executors v. Ewing*, 2 Casey, 135.

The case was well and carefully tried. The law was clearly and accurately stated by the learned judge. Substantial justice appears to have been reached—therefore,

Judgment affirmed.

CLOWSER V. JOPLIN MINING CO.

(4 Dillon, 469. (Note to *Bly v. U. S.*) U. S. Circuit Court West. Dist. of Missouri, 1877.)

¹ The value of the ore in place is the only just rule, where it is taken under *bona fide* claim of right, or where one tenant in common, in removing his own, necessarily takes his co-tenant's share.

¹ *In re United Co.*, 10 M. R. 153.

In an action of ejectment—above styled cause—in the Western District of Missouri, at the April term, 1877, the circuit judge (KREKEL, J., concurring) charged the jury as follows, in respect to the measure of liability for ores taken out of the land and sold by the defendant:

“On this subject no uniform rule applicable to all circumstances and all cases exists. Here is a case where (if the plaintiff is entitled to recover at all) the parties were in fact tenants in common, and where each party claimed the whole, and each denied any right in the other; where the defendants were rightfully in possession (for one tenant in common has as much right to the possession as another); where the plaintiff was absent and for years had paid no attention to the land; where the defendants developed, if they did not discover, the lead mines, and worked the same and took ore therefrom. The defendant company was organized and went into possession in 1874; the plaintiff appeared and set up a claim to the land in 1875, each party then claiming the whole. Under such circumstances, the court approves the rule laid down by the Supreme Court of Pennsylvania: Where ‘a tenant in common exercises his undoubted right to take the common property and has no other means of obtaining his own just share than by taking at the same time the share of his companion, the value of the ore in place is the only just basis of account.’ *Coleman’s App.*, 62 Pa. St. 278; *Barton Coal Co. v. Cox*, 39 Md. 1; 17 Am. Rep. 525, and cases cited.

“Under the statute of Missouri this rule may properly be applied in measuring the right to a recovery in respect to ores taken when one tenant in common recovers in ejectment against another.” Wag. Stats. p. 560, Sec. 13.

THE FRANKLIN COAL CO. V. McMILLAN ET AL.

(49 Maryland, 549. Court of Appeals, 1878.)

Proof of knowledge of boundaries. The plaintiff offered to prove by a witness that he was the boss miner of the defendants, a coal company, and that as such he considered it his duty to know the boundaries of defendants' property; that while superintending the cutting of timber on the company property for use in the mines, the defendants' general superintendent pointed out to him the division fence between the property of plaintiffs and defendants. *Held*, that the evidence was admissible for the purpose of showing knowledge on the part of the defendant of the lines of its property.

Surveyor's notes of processions—Evidence excluded. The testimony of a witness taken down by a surveyor while making a survey, and returned in his book of explanation, was not allowed to be read in evidence, though the witness was shown to be seventy-five years of age and in feeble health.

Right of tenant for life to mine coal. Prior to the beginning of a life estate in certain coal lands, coal had been taken and used for domestic purposes from an opening where the coal out-cropped, but it had never been mined for market. *Held*, that the tenant for life could not mine the coal for sale, but only for the purpose for which it had previously been mined.

¹ **Damages for coal rendered inaccessible.** In an action for damages to the reversion caused by removing coal in such manner as to injure the pillars and to render it more difficult or impossible to mine the remaining coal, the plaintiffs are entitled to recover for such coal as can not be won, what it is worth per ton in its native bed, and for so much of such coal as can be removed but with increased expense, damages to the extent of such expense; also for the depreciation of the value of the lands.

² **Cost of digging—Exemplary damages for trespass.** In an action of damages for mining and carrying away coal, the measure of damages is the value of the coal when first severed from the bed, *allowing nothing for the expense of digging*, and if the trespass was not unintentional, exemplary damages may be added. (ROBINSON, J., dissenting, as to non-allowance of expenses.)

Appeal from the Circuit Court of Alleghany County.

Lewis B. McMillan being seized in fee simple of certain lands lying in Garrett county, known as "Joseph's Farm," which included military lots Nos. 3836 and 3837, devised

¹ *Sheldon v. Davey*, 8 M. R. 581; *Barton Co. v. Cox*, 10 M. R. 157; *Powell v. Aiken*, 4 Kay & J. 343.

² See note to S. C., 33 Am. R. 282.

the same to Elizabeth McMillan, his wife, for life, and after her death to the appellees, William McMillan and Kate Coyner, their only children, in fee. This was an action on the case brought by the appellees to recover damages of the appellant.

The declaration averred that said lands were underlaid with valuable veins and seams of coal and other minerals, but had no mines or openings thereon in the lifetime of the said Lewis B. McMillan; and that while said lands were in the possession and occupation of Elizabeth McMillan, the life tenant, the defendant broke and entered into them, tunneled thereunder and made and sunk divers mines, drifts, headings, etc., and raised and conveyed away large quantities of earth, coal, and other minerals, and converted them to its own use; and further, that the defendant mined and excavated said coal and other minerals in such a careless and unskillful way as to render the mining and removing of the remaining mineral more difficult and expensive, and failed to leave proper supports for the surface; by all which premises the plaintiffs had been "injured, prejudiced and aggrieved in their said reversionary estate and interest in fee simple" in the said lands.

The plaintiffs, by a petition, stated that they had brought this action for waste committed on the lands described in the declaration, and could not show the extent of the coal dug upon the land by the defendant, and the damages sustained by the plaintiffs, without a warrant of re-survey to lay down on a plat the outlines of their lands, the extent of coal therein, the amount dug and carried away, and the portions of the mines that had fallen in and filled up from the unskillful mining of the defendant; they therefore prayed for a warrant of re-survey which was accordingly issued.

The defendant pleaded not guilty and limitations, and issues were joined.

This suit was instituted in Garrett county and at the instance of the plaintiffs was removed to Washington county, whence, at the instance of the defendant, it was removed to Alleghany county, where it was tried.

Under the warrant of re-survey the surveyor of Garrett county proceeded to re-survey and locate the lands of the

plaintiffs and defendant, and such other adjacent lands as were thought necessary, and the locations so made were returned into court.

It is not deemed necessary to set them out. They were offered in evidence, as also copies of certain patents; other evidence was also introduced.

First exception. The plaintiffs, in order to maintain the issue on their part joined, offered to prove by one William G. McMillan, that he was the boss miner of the defendant in the year 1855, and that he considered it was his duty as such boss miner to know the boundaries and lines of the defendant's property; and that one Thomas G. Kerr was the general superintendent of the defendant, in charge of its mines and works; and that he, McMillan, was superintending the cutting of the timber in said year on defendant's property, for the use of defendant in its mines; and while so engaged, said Kerr pointed out to him, McMillan, the division fence then standing between the plaintiffs' and defendant's property, and told him, McMillan, not to cut over said line, or allow timber to be cut over it; and that the division fence shown him by Kerr on said occasion, stood on the line of the old fence, as located by the plaintiffs. The defendant objected to the court allowing said evidence to go to the jury, but the court overruled said objection and permitted said evidence to be given to the jury for the purpose of showing knowledge on the part of the defendant of the lines of its property. To this ruling of the court the defendant excepted.

Second exception. The defendant, in order to maintain the issue on its part joined, offered to read in evidence from the surveyor's return and book of explanation, the testimony of Wm. Warnick, being as follows: "My age is seventy-five years; I was born in the house which stood upon the ground where I now stand; that is just where the door of said house stood; I have seen the reference lines run from this spot to the beginning of lot No. 3825:—" The testimony of the witness having been taken down on the survey by the surveyor, and returned in his book of explanation. The defendant having first proven by Dr. D. E. Miller, a practitioner at Westernport, that he had visited said Warnick at his house twice within the past week, and found from the examination there made that it would be exceedingly dangerous for him to come to

Cumberland as a witness in this cause ; that he, Warnick, was about seventy-nine years of age, and that he, Dr. Miller, did not think he ever would be able to appear as a witness in this court. Warnick's symptoms, as described by Dr. Miller, were severe pains in the head and back and limbs, and general debility and failure of strength, owing to old age and partial paralysis. On cross-examination, Dr. Miller stated that he lived about six miles from Warnick's house ; that Warnick lived about two miles from Barton, and that there was a railroad from Barton to Cumberland ; that he was not the regular physician of Warnick, and never saw him before the two interviews ; that he had one about ten days, and the other four days, before his evidence was given ; that he went to see him at the instance of the superintendent of the defendant, and was not sent for by Warnick ; knew nothing about Warnick, as to his general habits or health before his two visits ; that he examined him and found his pulse light and complained of dizziness and pain in the head. And then plaintiffs proved, on their own examination of Conrad Fazenbaker, that he is the brother-in-law of Warnick ; that he saw him Tuesday week ; he was very feeble as he has been for several years, sometimes weak and sometimes stronger. Plaintiffs then proved by Norman Jacobs that he was a neighbor of Warnick's—acquainted with him all his life ; saw him about four weeks ago going to the mill with a grist, riding on a horse and carrying a grist with him ; he had to come by way of Barton to get to the mill, and the mill was about one and a half miles from Barton ; he was as well then as usual, and as smart as men of his age usually are ; there are several physicians at Barton, and Dr. Crawford, of Barton, is Warnick's regular physician, and attends his family when sick ; subsequently the surveyor was being examined in reference to some alleged discrepancies between his statement at the trial and his return, and in explanation he read in the presence of the jury, the evidence that has been stated above, as that sworn to on the survey by Warnick, without objection on the part of plaintiffs ; but the court refused to allow the said evidence to be read to the jury when offered by the defendant. To this refusal of the court defendant excepted.

Third exception. The plaintiffs offered fourteen prayers,

the second, third and fifth of which the court rejected; the others it granted.

The following it is deemed sufficient to insert:

11. That if the jury believe, from the evidence in the cause, that the defendant dug and mined coal from the tract of land called "Joseph's Farm," as located by the plaintiffs, or any part thereof, and made excavations thereunder, and removed the coal so mined, and thereby injured the coal left remaining as pillars, or by bad mining or otherwise rendered it difficult or impossible for the plaintiffs to get out such pillars or remaining coal, or rendered it of less value to them, then the plaintiffs are entitled to recover such sum per ton for such coal as can not be removed as they shall find, from the evidence, it was worth in its native bed, and such damages for so much of such coal as can be removed but with increased expense, as they may find such coal to be diminished in value.

12. That if the jury shall find, from the evidence in the cause, that the defendant mined and excavated under the tract of land called "Joseph's Farm," as located by the plaintiffs—if they find said location correct—and thereby rendered it more difficult and expensive for the plaintiffs to obtain access to the coal under said lands, and depreciated the value of said remaining coal, then the jury may allow the plaintiffs such damages as they may find the plaintiffs have sustained from the depreciation of said land, and the increased difficulty and expense of obtaining access to the coal remaining therein.

13. That if the jury shall believe, from the evidence in this cause, that the defendant mined out coal under the land called "Joseph's Farm," as located by the plaintiffs, and that said location is correct, then the plaintiffs are entitled to recover such sum per ton as the jury may find said coal so mined was worth when first severed from its native bed, and before it was put upon the mine cars, without deducting the expense of severing said coal from its native bed.

14. That if the jury find, from the evidence in the cause, that the defendant, at the time of mining out the coal and excavating under said land, knew that said lands were not its own, then the jury are not limited to the actual amount of damages committed (if they shall find any have been committed), but may find such further damages as the facts and cir-

circumstances accompanying such mining of coal and excavating under said land may warrant.

The defendant submitted ten prayers, the first, fourth and eighth of which the court granted; the others it refused, but substituted an instruction in place of the seventh prayer rejected. The ninth prayer was withdrawn.

The following prayers only it is deemed necessary to insert:

2. If the jury find, from the evidence in the cause, that the defendant broke and entered into the lands spoken of in the evidence, and dug out and carried away coal therefrom within three years prior to the institution of this suit, and that said lands were within the boundary lines of the property devised by Lewis B. McMillan to Elizabeth McMillan for life, and after her death to the plaintiffs in remainder, and that said life tenant was in possession of said property at the time of said digging and carrying away, and is still alive and in possession thereof, then the plaintiffs can not recover under the pleadings and evidence in this case.

3. If the jury find from the evidence in the cause that the defendant broke and entered into the land spoken of in the evidence, and dug out and carried coal therefrom, and that said lands were within the boundary lines of the property devised by Lewis B. McMillan to Elizabeth McMillan for life, and after her death to the plaintiffs in remainder, but also find that the mine of said plaintiffs was already open as shown on the plat marked "C. O.," and had been so open in the life time of said Lewis B. McMillan, and that said life tenant was in possession of said property at the time of said digging and carrying away, and is still alive and in possession thereof, then the plaintiffs can not recover under the pleadings and evidence in this case.

5. If the jury believe from the evidence in the cause that the defendant broke and entered into the lands of the plaintiffs at the places located on the plats, within three years prior to the institution of this suit, and that the said defendant mined out coal from said lands, but that in so doing the defendant believed itself to be the *bona fide* owner of the land so taken and entered and of the coal so mined out, then the plaintiffs can only recover such sum as the jury may find from the evidence was the value of the said coal so mined out before it was severed from the mine.

To the action of the court in granting certain of the plaintiff's prayers and in rejecting certain of its prayers, the defendant excepted. The verdict and judgment being for the plaintiffs, the defendant appealed.

The cause was argued before BARTOL, C. J., STEWART, BRENT and ROBINSON, JJ.

ARTHUR W. MACHEN and ORVILLE HORWITZ, for the appellant.

S. A. COX, WILLIAM WALSH and THOMAS J. MCKAIG, for the appellees.

BARTOL, C. J., delivered the opinion of the court.

For the reason stated in the opinion of our brother Robinson, we all agree that the instructions given to the jury by the circuit court, in regard to the locations made by the plaintiffs and defendant, were correct, and that it was not error to grant the first, fourth, sixth, seventh, eighth and ninth prayers of the plaintiffs, and also that the second and third prayers of the defendant were properly refused.

We are also of opinion that the evidence offered by the plaintiffs, contained in the first bill of exceptions, was properly admitted for the purpose therein stated. But upon the question of the measure of damages, a majority of the court think there was no error in the rulings of the circuit court, and that they ought to be affirmed.

The evidence in the case proves that the defendant's agents, while engaged in mining coal upon its own land lying contiguous to that of the plaintiffs, extended their mining operations beyond the limits of its own land into that of the plaintiffs, and removed therefrom a quantity of coal; and this suit was brought to recover damages for the trespass. The form of action is in case, brought by parties entitled to the reversion in the land upon which the trespass was committed. But in our judgment, so far as the question arises in the present case, the rule regulating the measure of damages is the same as if the suit were in trespass by parties owning the fee and entitled to the immediate possession.

No valid objection can be made to the granting of the eleventh and twelfth prayers of the plaintiffs and we do not understand the appellants as complaining of them. They are identical with the instructions affirmed by this court in *The Barton Coal Co. v. Cox*, 39 Md. 1.

The objection relied on by the appellant is to the granting of the plaintiffs' thirteenth and the refusal of the defendant's fifth prayer.

By the former the jury were instructed that the measure of damages was the value of the coal when first severed from its native bed, without deducting the expense of severing it. The defendant's fifth prayer asserts the proposition, that if the defendant mined out the coal from the plaintiffs' land, *and in so doing believed itself to be the bona fide owner of the land and of the coal so mined*, then the measure of damages is the value of the coal in its native bed, before it was severed from the mine.

The question presented by these prayers is not a new one in this court; it was fully considered and decided, we think, in the case of the Barton Coal Co., before cited.

There the court below granted the plaintiff's *third* prayer, identical with the thirteenth prayer in this case, and refused the *second* prayer of the defendant, which was in these words:

"If the jury shall find, etc., that the defendant dug out and carried away the coal of the plaintiffs without knowing that it was trespassing upon the property of the plaintiffs, and believing that it was its own coal, then the measure of damages for such digging and carrying away of coal is the value of the coal in the mine."

The ruling of the circuit court upon these prayers was affirmed. After the decision was rendered, an application for a rehearing was made by appellant's counsel, in which they asked the court to re-consider its decision upon the question of damages, but the application was refused.

In the opinion then filed the decided cases were examined and the question carefully considered, and the court adopted as the true rule that laid down in *Martin v. Porter*, *Morgan v. Powell* and *Wild v. Holt*.

We have examined all the cases which have been cited in the argument, and have discovered no sufficient reason for de-

parting from the decision so recently made by this court; nor have we seen any good reason to doubt that the rule then announced is, upon the whole, a sound and salutary one, which, while it awards no more than a just compensation to the party injured, will, as said by Baron Parke, "tend to prevent trespasses of this kind."

We think no real distinction can be drawn between this case and that of the Barton Coal Co.

There, this court held the rule applicable, though the defendant was not a willful trespasser, but "*dug the coal, without knowing that it was trespassing upon the property of the plaintiffs, but believing it was its own coal.*"

It is said that in that case there was no dispute or question about boundaries, and that it was *negligence* in the defendant to go beyond its own lines; but the trespass was committed under ground, where the lines were not easily ascertained. Trespasses on the land of another, if not willful, always imply some degree of negligence. In this case the defendant's excuse is, that it claimed to be the owner of the land. But it has been shown by the proof and by the verdict that its claim was not well founded; as said in *Maye v. Yappen*, 23 Cal. 306, "where a party has the means of ascertaining the dividing line, he is guilty of negligence in not ascertaining its location."

In this respect, therefore, this case is not to be distinguished from that of the Barton Coal Co.

Considering that case as decisive of the present, we have not thought it necessary to make further reference to the authorities, or to discuss the proposition there decided over again.

Upon the *second* bill of exceptions, we are of opinion that the ruling of the circuit court, therein stated, furnishes no ground for reversal, because we think the evidence offered for the purpose of proving that the absent witness was unable to attend, by reason of physical inability, was not sufficient to establish that fact.

Finding no error in the ruling of the circuit court, the judgment will be affirmed

Judgment affirmed.

(Decided 24th July, 1878.)

ROBINSON, J., filed opinion concurring in all points except upon the measure of damages.

HUNTINGDON AND BROAD TOP RAILROAD AND COAL
CO. v. ENGLISH.

(86 Pennsylvania State, 247. Supreme Court, 1878.)

¹**Failure to deliver stock.** Where there is no trust relation between the parties and no obligation to deliver specific stock, the measure of damages for a failure to deliver stock is the market value of the stock on the day it should have been delivered, with interest thereon to the time of trial.

Error to the Court of Common Pleas of Philadelphia County.

Assumpsit by Alfred English against the Huntingdon and Broad Top Railroad and Coal Company, plaintiff in error.

Plea, *non-assumpsit*.

The plaintiff, having loaned the defendants 200 shares of Pennsylvania Railroad stock, took from them the following agreement:

“OFFICE HUNTINGDON AND BROAD TOP MOUNTAIN
RAILROAD AND COAL COMPANY, BOX 2733.

Philadelphia, April 13th, 1867.

Received of Mr. Alfred English, 200 shares of Pennsylvania Railroad stock, to be returned to him on the fifteenth day of June, 1867, and we have deposited with him, as collateral security for the same, twenty of the consolidated mortgage bonds of this company for \$1,000 each, Nos. 1094 to 1098, 1256, 1243 to 1247, 1226, 1428 to 1435, inclusive, and do hereby authorize him, upon the non-performance of this promise at maturity, say on the fifteenth day of June, 1867, to sell, either at private or public sale, or at the Broker's Board, the above named bonds at the then market price, without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment or replacing of the said 200 shares of stock and all necessary expenses and charges, holding the company responsible for any deficiency, or paying the company the overplus, if any.

L. T. WATSON, President.”

¹ *Fromm v. Sierra Nevada Co.*, 61 Cal. 629; *Boylan v. Huguet*, 8 Nev. 345; *Post TROVER*; *Bond v. Mt. Hope Co.*, 99 Mass. 505; *Post TROVER*.

It appeared at the trial, by the testimony of the plaintiff, that the defendants at the same time agreed to pay him what he called a "commission," viz., interest at the rate of eight per cent. a year on \$10,000 until the stock was returned.

The stock not having been returned at the time designated, a new agreement was made between the parties, on the thirty-first day of October, 1867, and embodied in the following document:

"Philadelphia, October 31st, 1867.

ALFRED ENGLISH, Esq.,

Dear Sir: If you will withdraw the suit for your Pennsylvania Railroad stock loaned us, we will pay the attorney's fee, and we will faithfully agree to pay you, on account of the same, \$500 on the 23d November next, 1867; \$1,000 21st December, 1867; \$500 on 23d January, 1868; \$2,000 on 21st of March, 1868; \$3,000 21st June, 1868, and \$3,000 21st September, 1868. If the amounts of money specified are not sufficient to replace the said 200 shares Pennsylvania Railroad stock, we do agree to pay to you as much in addition as will be required on the 21st of September, 1868, to make the said stock good. We furthermore agree to pay to you interest on the \$10,000, at the rate of eight per cent. per annum, as heretofore. The securities (the company's bonds) are all to be retained by you until the said stock is returned. When said stock is returned to you, you are to repay to us the amount of moneys paid to you in accordance with the above, with interest at the rate of eight per cent. per annum. On the non-fulfillment of this agreement or any portion of it, you are authorized to proceed at once with the suit. Should the company return you the stock at any time previous to the 21st of September, 1868, then any moneys which have been paid to you on account are to be repaid to the company. If any stock dividends are declared by the Pennsylvania Railroad Company at any time, said stock dividends are to stand in your name, and the certificates of stock are to be delivered to you as soon as received from the company. The cash dividends that may be declared at any time are to be paid to you in cash at the time the said company pay them.

Yours truly,

L. T. WATSON, President.

Attest:

J. P. AERTSEN, Secretary."

Alfred English accepted.

Under this agreement the defendants paid the plaintiff the installment of \$500 due on the 23d of November, 1867; that of \$1,000 due on the 21st of December, 1867; and on the 23d day of January, 1868, the day when the third installment fell due, they gave the plaintiff their negotiable promissory note for the sum due (\$500), paying the interest thereon in advance. This note was not paid at maturity, and remained unpaid at the trial.

The "interest on the \$10,000, at the rate of eight per cent. per annum," provided for in the agreement, was paid up to the 21st of March, 1868.

On the 20th of August, 1868, the plaintiff gave the defendants notice that the "consolidation bonds" held by him "as collateral security for the Pennsylvania Railroad stock loaned," would be advertised September 9th, and sold by M. Thomas & Sons, September 14th, if the stock, with interest, was not returned. The bonds were actually sold on the 15th of September, 1868, for fifteen per cent. of their par value, the net proceeds of the sale amounting to \$2,944. A statement of the sale was furnished to the defendants on the 22d day of September, 1868, in a note from the plaintiff, which concluded by saying, "for the balance due me according to agreement, I hold your company responsible."

The defendants acknowledged the receipt of the plaintiff's communication; but in so doing, refused to admit the plaintiff's power to sell the bonds without their consent.

On the 3d of April, 1873, the plaintiff brought the present suit. The first two counts in his declaration being on the agreement of April 13, 1867, and the next three on the agreement of October 31, 1867.

Neither the money nor the notes received under the second agreement had been returned or tendered to the defendants before the suit was brought, or at any time thereafter.

At the trial before HARR, P. J., the plaintiff made the following offers of evidence:

1. To prove the highest market price of Pennsylvania Railroad stock, between the date of default made in the payment of the fourth installment, under the contract of October 31, 1867, and the date of the bringing of the suit, April 3, 1873.

2. To give evidence of all the dividends, cash and stock of the Pennsylvania Railroad Company, from the date (March 21, 1868) of default made in payment of the fourth installment, due under the contract of October 31, 1867, and the date (April 22, 1871) when the market price of the stock was highest. .

3. Evidence of the options offered between the dates last aforesaid to holders of stock of the Pennsylvania Railroad Company to subscribe for new stock at par.

4. Evidence of the cash and stock dividends and options to purchase stock at par, paid and offered by the Pennsylvania Railroad Company between the date when the price of the stock was highest and the date of the offer (November 9, 1875).

All these offers, under objection, were admitted. The following points were presented by the defendants, all of which the court refused.

1st. That the plaintiff's right of action is upon the contract of October 31, 1867, and not upon the contract of April 13, 1867.

2d. That there is no evidence in the case to warrant the jury in finding that the option of rescinding the contract of October 31, 1867, was duly exercised by the plaintiff.

3d. That the omission of the plaintiff to tender back the money paid and the note given by the defendants under the contract of October 31, 1867, and to demand the return of the stock, precludes him from recovering except under the contract of October 31, 1867.

4th. That the measure of the plaintiff's damages is the amount of money which should have been paid him under the contract of October 31, 1867, with interest at the rate of six per cent. from the dates at which the respective payments should have been made.

5th. That the plaintiff is not entitled to recover as damages the highest value of the stock between the time when his right of action accrued and the bringing of his suit, or between the former date and any date subsequent thereto.

6th. That the plaintiff is not entitled to recover under the contract of April, 1867, for stock or cash dividends declared on Pennsylvania Railroad Company stock.

7th. That the same instruction applied to a recovery under contract of October 31, 1867.

8th. That if the plaintiff can maintain his action under the contract of April, 1867, then the installments of money subsequently paid by the defendants on account of the plaintiff's claim must be considered as equivalent to a return to the plaintiff of such number of shares as could have been purchased therewith.

9th. That the sale of the collateral bonds was unauthorized, and that, so far as appears from the evidence in this case, the defendants will be entitled to a return of the bonds after the payment of the debt due to the plaintiff, and the defendants are not therefore to be credited in this suit with the sum received from the sale of said bonds.

In their general charge the court, *inter alia*, said :

"That under the evidence in this case, the measure of damages was either the highest market price of the stock between the date of default made by the defendants in the performance of the agreement of October 31, 1867, and the date of trial, with interest, and all dividends and increments on the stock up to the date of such highest price, or the market value of the stock at the date of trial, with all dividends and increments thereon, from the time that default was made in the performance of the agreement of October 31, 1867; that their verdict should be for the smaller of these amounts, the plaintiff's counsel having consented to this; that the defendants were not to be credited with the amount of stock which the installments paid by them under the agreement of October 31, 1867, would have purchased if invested at the dates of payment in the purchase of stock; the counsel on both sides agreeing, however, that if a different view of this point should be taken hereafter, the proper reduction should be made."

The jury rendered a verdict for the plaintiff for \$14,558.20, that sum being the result of one of the calculations submitted to them by the plaintiff. The defendants assigned for error the admission of the evidence offered, the refusal of their points and the portion of the charge noted.

JAMES E. GOWEN, for plaintiffs in error.

S. S. HOLLINGSWORTH and GEORGE W. BIDDLE, for defendant in error.

GORDON, J., delivered the opinion of the court.

We do not regard the acceptance, by English, of the proposition made by the president of the company in his letter of October 31, 1867, as the conclusion of a new contract, but rather the extension of the former arrangement. This previous undertaking contemplated the delivery to the plaintiff, on the 15th of June, 1867, of the 200 shares of Pennsylvania Railroad stock, which the defendant had received as a loan from plaintiff on the 13th of the preceding April. There was no return made of these shares at the date indicated, and English was about to bring suit, when the proposition of the 31st of October was made and accepted.

Taking these two papers as one contract, and we observe that it provides—generally, for the return of the stock or its equivalent in money on the 21st of September, 1868—specially, for payments in cash to be made from time to time, in all amounting to \$10,000, the par value of 200 shares, or if this sum was insufficient to “make good,” as the parties termed it, the said shares at the dates specified, the company undertook to pay as much more as would accomplish that object. If, on the other hand, the defendant chose to return the stock at the time fixed by the contract, the plaintiff was required to refund the money which he had in the meantime received; finally, in case any one of the provisions of this contract was not complied with on the part of the company, English was at liberty to proceed with his suit at law.

Now, as these were independent contracting parties, bound to each other by no ties save those found in their contract, and as they, by that contract, had, from the beginning, settled the compensation due English, in case of a failure to return the stock shares at the time fixed, why should we seek for any other rule of compensation than that fixed by themselves? It is certain, had the company tendered to English the value of the shares in cash on the 21st of September, 1868, he would have been obliged to receive it. On the other hand, in the absence of such tender, the plaintiff might have gone, upon

that day, into the market and supplied himself with 200 shares of the Pennsylvania Railroad Company's stock, and have compelled the defendant to account for the price thereof. Thus we take it, the rights of the parties were definitely fixed at the time when the breach occurred, just as would have been the case had the agreement been for the delivery of two hundred bushels of wheat, or of any other articles of a marketable character.

It is obvious, therefore, that the court below erred in applying the rule stated in the case of *Bank of Montgomery v. Reese*, 2 Casey, 143, to the controversy in hand, since the contract itself carries it beyond the reach of that rule. Moreover, that rule applies only where the parties bear to each other a trust relation. In *Wilson v. Whitaker*, 13 Wright, 114, this court refused to adopt the above stated rule as applicable to stock contracts generally, and the learned judge who delivered the opinion in that case, whilst recognizing the case of the *Bank v. Reese* as binding in all cases involving a trust, said that the dicta, tending to carry the rule beyond the point stated, were not essential to the case, and were extra-judicial. A similar remark might well be made of the dicta in the case of *Musgrave v. Beckendorff*, 3 P. F. Smith, 310, for there the plaintiff's claim was based on an agreement for a return of the identical bonds loaned, and, as his property in them was not divested by the contract, it was a breach of trust in the defendant to sell or otherwise dispose of them; hence, as the above stated rule might well apply on principle, the adoption of the extra-judicial dicta of the *Bank v. Reese*, was not necessary. *Persch v. Quiggle*, 7 P. F. Smith, 247, was the case of an agent who had committed a breach of trust in the disposition to his own use of stock shares intrusted to his keeping. And in *Neiler v. Kelley*, 19 P. F. Smith 403, and *Work v. Bennett*, 20 Id. 485, the rule was held not to apply in cases of trover. As yet there does not seem to be any case on our books which prevents the limitation of the rule of the *Bank v. Reese*, to cases involving a trust, or to those, the peculiar character of which renders the application of that rule necessary, in order that justice may be meted out to the parties litigant. Such, however, is not the condition of the case in hand. The agreement of the 31st of October re-

quired, that the plaintiff should be paid by installments of cash as therein mentioned, and the return of the stock, in kind, was an option belonging to the company. As this contract was in part executed by the payment of the first two installments by the defendants, and by the retention and sale of the collaterals by the plaintiff, the default can not be treated as a rescission of the contract, but only as a breach, the damages for which must of necessity be measured by the money due the plaintiff at the time of such breach, with interest to the date of verdict.

It follows that English was entitled to recover from the defendant the value of the two hundred shares of stock, as of the 21st of September, 1868, with the dividends and simple interest, deducting therefrom the payments as of the date when severally made.

As we think the collaterals were properly disposed of, we refuse to sustain the 15th assignment of error.

Judgment reversed and a new venire is awarded.

WATERS, Respondent, v. STEVENSON, Appellant.

(13 Nevada, 157. Supreme Court, 1878.)

Form of action immaterial—Complaint construed. It does not matter whether the complaint state facts which would amount to trover or to trespass, at common law. Complaint construed and *held*: valid to support judgment for value of the ore in place, or value immediately after separation.

¹ **Recovery by tenant against trespasser—Royalty not deducted.** The right in the tenant of leased mines is absolute, and if a trespasser take his ore during term, the royalty which the tenant should pay the landlord is not to be deducted.

Compensation only, the rule in tort. In actions sounding in tort, but not involving fraud (malice) or culpable negligence, the aim of the law is to award full compensation, but nothing beyond.

Review of the cases, English and American, on the question of deductions for cost of mining, in trespass for ore taken.

Trespasser allowed cost of mining. A trespasser taking ore, in the absence of fraud or culpable negligence by overstepping boundaries, is entitled to deduction of the cost of mining the ore in question.

¹ *Attersoll v. Stevens*, 10 M. R. 67; *Bannon v. Mitchell*, 2 M. R. 108.

Appeal from the District Court of the First Judicial District, Storey County.

The defendant, after having introduced evidence tending to show the gross amount and value of the bullion which could be extracted from each ton of said ore, for the purpose of showing the real value of the ore, proposed to prove the cost per ton of extracting and working the same, and for this purpose his counsel asked of defendant while on the stand as a witness, the following question: "What was the necessary expense per ton of digging down the ore taken by you from the Trench and Bowers mine?" To which plaintiff's counsel objected, on the ground that the only expense which could properly be allowed to defendant as a deduction from the gross yield, was the expense necessarily incurred after the ore had been picked down upon the floor of the mine. The court sustained the objection and excluded the testimony, and ruled that no proof could be offered as to any expense incurred or necessary to be incurred before the ore was so picked down from its place in the mine. To which ruling the defendant then and there duly excepted.

The facts are stated in the opinion.

C. J. HILLYER, for appellant.

LEWIS & DEAL, for respondent.

By the Court, LEONARD, J.

The record in this case discloses the following material facts: On or about the second day of October, 1871, plaintiff was the owner, and in possession of a certain mining claim in Gold Hill mining district, in this State, known and called the Bowers claim, and was in possession, and entitled to the possession, as lessee thereof, of a certain mine known and called the Trench mine. On the day stated, plaintiff leased a portion of each of said mines to one Armstrong, for the period of twenty months; that is to say, from October 1, 1871, until June 1, 1873. By the terms of the lease Armstrong had the right at his own cost and expense to enter upon and take pos-

session of both of said mines, from and including the surface, to and including the five-hundred-foot level of each, and extract therefrom all metalliferous ores he might desire to take, and convert the same to his own use. Armstrong agreed to pay plaintiff for each and every ton of ore extracted and taken which would mill fourteen dollars per ton, the sum of one dollar and fifty cents; and for each and every ton so extracted and taken which would mill fourteen dollars and upward to sixteen dollars, the sum of two dollars; and for each and every ton so extracted and taken which would mill over sixteen dollars per ton, the sum of two dollars and fifty cents. Armstrong also agreed to take all ore from the mines which would mill twelve dollars per ton; and to work the ore taken within sixty-five per cent. of the assay value. By the terms of the lease no rights were reserved by plaintiff, the lessor, other than the privilege of having access to the mines at all times, for the purpose of inspecting the same, and the right to declare the lease forfeited at his option, in case of failure to make payment for the ores excavated and taken away. It does not appear that plaintiff declared a forfeiture of the lease, nor is it denied that the lease was in full force until the end of the term. Armstrong agreed to work the mines in a good, workmanlike manner, and return the machinery leased in connection therewith in good working order, ordinary wear excepted. He agreed, also, upon the expiration of the term, to surrender said mines, with the dumps, cars, tools and appurtenances, to plaintiff. Armstrong took possession of both mines and the other property mentioned, under the lease, and engaged in extracting and taking out ores.

Defendant admitted in his answer, and at the trial, that he entered upon a portion of each of the mining claims leased to Armstrong, subsequent to the date of the lease, and that he mined and converted to his own use a certain number of tons of metalliferous ores containing gold and silver; but he denied that he did it willfully or intentionally, and alleged that his entry upon the said mining claims was the result of inadvertence and mistake, under the *bona fide* belief that he was mining within the boundaries of his own adjoining mines. The verdict of the jury was in favor of defendant's alleged *bona fides*. On the ninth day of April, 1873, Armstrong, for a

valuable consideration, sold and assigned to plaintiff both leasehold interests before mentioned, and on the twenty-third day of June, 1874, for a valuable consideration, sold and assigned to plaintiff all claims and demands, of every nature and kind, which he had against defendant, described in the complaint herein.

The main question presented for our consideration is, as to the proper measure of damages in a case of this kind. In the court below defendant contended that the recovery should be limited to, and measured by, the value of the ore in place, as it lay in the mines before his entry; that plaintiff should recover only the gross proceeds of the ores extracted and worked by defendant, less the necessary cost of mining, assorting, hoisting, transporting and milling, and that plaintiff was not entitled to recover the amount agreed by Armstrong to be paid to plaintiff as royalty. The court held, and so instructed the jury, that if defendant by mistake, and not willfully, wrongfully extracted ores from the mines being worked by Armstrong, plaintiff should recover their gross yield, less the necessary expense of assorting, transporting, hoisting, hauling and milling, and all other necessary expense after the ore was picked down in the mine.

Defendant requested the court to instruct the jury to include in his expense the amount per ton which Armstrong, by his agreement, was obliged to pay plaintiff for the privilege of extracting the ores, but this instruction was refused. It is urged by counsel for defendant that the court erred in charging the jury to exclude from his necessary expenses, to be deducted from the gross yield of the ores, the necessary cost of mining, and the amount per ton agreed to be paid by Armstrong to plaintiff.

Plaintiff claims to recover under and by virtue of the assignments from Armstrong, and it is admitted by counsel on both sides that he can recover, in this action, the same amount that could have been recovered by Armstrong, had no assignments been made, and no greater sum.

Counsel for defendant claims that this is an action of trespass for damages done to real estate; while counsel for plaintiff seem to treat it as trover or trespass *de bonis*, at least they urged the adoption of the same rule of damages as they assert is the true rule in those cases.

It is alleged in the complaint: "That in the month of November, 1871, one W. H. Armstrong was in the lawful possession of, and until about the ninth day of April, 1873, continued in the lawful possession, by virtue of a certain leasehold interest therein, of all that portion from the surface down to and including the 500-foot level or adit of that certain mining claim, quartz vein or lode situated in Gold Hill mining district, * * * known and called the 'Bowers claim,' and described as follows: * * * and said Armstrong was entitled, by said leasehold interest in his own right, to all the gold and silver-bearing ores and earth therein, from the surface to said 500-foot level or adit; that plaintiff was, at all the dates hereinbefore and hereinafter mentioned, the owner of the mining claim, quartz vein, or lode above described; that while said Armstrong was so in the possession and entitled to the possession, by virtue of his said leasehold interest in the same, to wit, on or about the thirteenth day of May, 1872, said defendant wrongfully and willfully entered into and upon said mining claim and ledge aforesaid, above the 500-foot level or adit thereof, and commenced extracting, and did extract, take and wrongfully carry away from said mining ground, * * * within five hundred feet of the surface thereof, large quantities of valuable metalliferous ores containing gold and silver, to wit, one hundred and sixty tons of the value of four thousand dollars, and did deprive said Armstrong thereof; that but for the wrongful act of the defendant, as aforesaid, the said Armstrong would have had and received all the aforesaid metalliferous ores * * * to his own use, under and by virtue of said lease; that by reason of the premises said Armstrong was damaged by defendant in the sum of four thousand dollars in United States gold coin."

Plaintiff then, in substantially the same language, states another cause of action against defendant by reason of his alleged willful, wrongful, and unlawful entry upon the said Trench mine, and extracting and carrying away therefrom four hundred and eighty tons of metalliferous ores, containing gold and silver of the value of twelve thousand dollars.

It is then alleged, as applicable to both causes of action, "That said Bowers claim * * * and the said Trench mine were, at the times aforesaid, and are, only valuable for and on

account of the metalliferous ores bearing gold and silver, which were imbedded therein." * * *

As we regard the cause, it is a matter of no practical consequence which theory is technically correct as to the form of the pleadings. The result, in any event, must be in accordance with the facts alleged and proven. The action is brought to recover damages for certain unlawful acts performed by defendant. It is brought upon the whole case, and all the facts constituting plaintiff's cause of action as to each mine are stated in one count. It is said in *Jones v. Steamship Cortes*, 17 Cal. 487, that "every action under our practice may be properly termed an action on the case." Our statute provides that "the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language. If a recovery of money or damages be demanded, the amount thereof shall be stated." (C. L. Sec. 1192.) The complaint charges that defendant willfully and unlawfully entered upon the mines described, and willfully and unlawfully extracted therefrom and converted to his own use six hundred and forty tons of ores, of the value of sixteen thousand dollars, to plaintiff's damage in the same sum. A cause of action is stated by an allegation of the facts, and the alleged amount of damages is demanded; and whether the pleader intended to allege trespass to the land, or trespass *de bonis*, or trover, the result is that the plaintiff is entitled to recover just such damages as are allowable from the facts alleged and proved, which make up the whole case. The amount, of course, will depend upon the rule adopted in ascertaining the true measure.

The facts stated in the complaint are sufficient to support a judgment for the damage sustained, whether that be the value of the ores in place, or after they were separated from the mines.

It is said by counsel for defendant that the court erred in refusing to charge the jury to include in his expenses to be deducted from the gross yield of the ores, the amount per ton that Armstrong was obliged, by the terms of the lease, to pay plaintiff as royalty. In this connection it is especially important to keep in mind the fact that plaintiff's rights are just the same as Armstrong's would have been had the latter brought this action. By the terms of the lease, for twenty

months, Armstrong had the same right to work the mines mentioned as had plaintiff before the execution of the lease. He could excavate, carry away, and mill all the ores contained in the portion of the mines described in the lease. The right of possession was in him exclusively. He could have maintained an action against all persons disturbing his possession or trespassing upon the premises, including plaintiff himself. He could have used force necessary to resist defendant's entry or his removal of the ores, or he could have invoked and received the aid of the law for his protection. Plaintiff could not have maintained trespass for an injury done to the land, because the possession and right of possession were exclusively in Armstrong.

Armstrong had the right to give defendant permission to mine and carry away the ores. So, if defendant wrongfully entered and worked the mines without his permission, his right was to allow him to do so and take his chances of recovery in an action for damages, instead of working them himself, or instead of making forcible resistance to his entry or resorting to legal process for the protection of his property. It is true that under the lease Armstrong had the privilege of taking out as many tons as he pleased and no greater number; but his right to the whole was just as absolute and inviolable as it would have been had he positively agreed to mine all the ores in the mines. During the life of the lease, an unlawful entry was a disturbance of the rights and possession of Armstrong alone, and every pound of ore taken belonged to him and not to his lessor. Had the taking of ores been prohibited by the terms of the lease, they would have become the property of plaintiff as soon as they were detached from the mines; but the right of mining and appropriating the ores having passed to Armstrong, the right, as well as the remedy for its infringement, remained in him until the assignment to plaintiff: *Taylor's Landlord and Tenant*, 5 Ed., Secs. 173-4-5-6-7-8; *Washburn on Real Prop.*, Vol. 1, marg. p. 314; *Attersoll v. Stevens*, 1 Taunton, 200; *Schermerhorn v. Buell*, 4 Denio, 425. But while the lease gave Armstrong the rights stated, he could not avail himself of them, either by taking out the ores himself, or by receiving satisfaction therefor from defendant, without fixing his own liability to plaintiff according to the

terms of the lease. Such being the case, it is not necessary to decide whether Armstrong would or would not have been liable to plaintiff in an action for waste on account of the ores taken by defendant; *Attersoll v. Stevens, supra*; *Cook v. Champlain T. Co.*, 1 Denio, 104; *Taylor's Landlord and Tenant*, Secs. 178, 343 *et seq.*, 689; *Smith's Landlord and Tenant*, 268; *Austin v. H. R. Co.*, 25 N. Y. 340. If Armstrong had sold his right to the defendant to work these mines, and had received the contract price therefor, or if, after discovering his mistake, defendant had paid Armstrong for the ores wrongfully taken, there can be no doubt that plaintiff could have recovered of Armstrong the full amount of royalty stated in the lease. In either case, the fact that Armstrong had received satisfaction from defendant, would have been proof that the former claimed the benefits of the lease as to the ores mined by defendant, and that he recognized the validity of plaintiff's claim against him according to the terms of the contract. He could not derive the benefits of the lease without assuming the burden it imposed. Had he without suit received satisfaction from defendant, the money received, as between him and plaintiff, would have taken the place of the ores, and he could not have escaped payment on his covenant for all ores taken. Possession and right of possession having been in Armstrong, and the ores, both in and out of the mine, having been his property, he would have had an undoubted right to bring this action. Had he done so, and obtained satisfaction against defendant by the law's aid rather than by agreement, the result would have been precisely the same as that before stated. In either case he would have been liable to plaintiff for the amount agreed to be paid. Had Armstrong brought this action, then defendant could not have included the royalty in his expense to be deducted from the gross yield of the ores. His rights are no greater in an action brought by plaintiff, the assignee of Armstrong: *Attersoll v. Stevens, supra*; *Wild v. Holt*, 9 M. & W. 672. It follows that the assignment of error just considered can not be sustained.

The next and more important question to be considered is: Did the court err in instructing the jury not to include in defendant's expenses to be deducted from the gross yield, the necessary cost of mining the ores?

We are of the opinion that in all actions sounding in tort, no fraud or culpable negligence appearing, the aim of the law is to award to the injured party full compensation for his actual losses, as the law defines those words, and nothing beyond that amount.

In *Buckley v. Buckley*, 12 Nev. 423, which was an action to recover the possession of personal property, or the value in case delivery could not be had, and damages for its detention, or the value of the use thereof, we held, if a return of the property could not be had, and its value had been appreciated by the labor and expenditure of the wrong-doer, acting wrongfully but in good faith, that the latter should not be permitted to retain any profit, but that he should be allowed from the appreciated value, after the real owner had been fully compensated, all his expenses necessarily incurred in increasing the value of the property, if so much remained after the actual damages had been satisfied.

In *Ward v. C. R. W. Co.*, subsequently decided (13 Nev. 44), which was an action to recover the value of wood alleged to have been converted by defendants at Empire City, in this State, we held that the conversion was in Alpine county, California, where the wood was less valuable than at Empire City, and that plaintiff was entitled to recover the value of the wood at the former place, with interest, but not the enhanced value caused by the labor and expenditure of defendants; that such measure of damages fully compensated plaintiff's actual loss, and no greater sum should be awarded.

In both of those cases the value of the property was enhanced after the conversion, while in this case the expenditure not allowed defendant by the court, and by which the value of the ores was increased, was incurred before they became personal property, and consequently before conversion was possible. But we can perceive no reason why the distinction between the facts of those cases and this can justify the adoption of a principle in the former that should not be adhered to in the latter.

It is said by counsel for plaintiff that no less stringent rule of damages should be adopted in trespass than in trover, and that in the latter action, the rule adopted by this court in *Boylan v. Huguet*, 8 Nev. 345, is the value of the property at

the time of the conversion, with interest. That such is the general rule, there can be no doubt; and that it should be so is equally plain, because in most cases such an award makes full compensation for the injury complained of, and no more. In that case the court stated the general rule, and applied it to the case then under consideration. But it declared the governing principle to be "complete indemnity to the party injured, but no punishment to the wrong-doer."

The reason why the general rule stated was adopted, is because, in most cases, it approaches nearer making full compensation than any other; but we do not understand that this court has ever held that it is unvarying in its application, if in any case a departure from it will better accomplish the object of the law. It is well known that to the general rule there are many acknowledged exceptions. In *Pierce v. Benjamin*, 14 Pick. 361, the court says: "The general rule of damages in actions of trover is unquestionably the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule as plain and well established as the rule itself. Wherever the property is returned, and received by the plaintiff, the rule does not apply. And when the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases, and justice forbids its application. In all such cases, the facts may be shown in mitigation of damages." And in *Baldwin v. Porter*, 12 Conn. 484, it is said: "Both the rule and exceptions proceed upon the principle that the plaintiff ought to recover as much, and no more, damages than he has actually sustained, which commonly is the value of the property; and hence the general rule. No good reason, consistently with moral principle, can be suggested why greater damages should ever be recovered than have in truth been sustained, except in those cases where the law permits by way of primitive justice, the recovery of vindictive damages." See, also, *Curtis v. Ward*, 20 Conn. 206. We agree fully with the principle announced by that court, and shall endeavor to apply it to this case.

Although entertaining the greatest respect for the courts that have held otherwise, we are unable to say in this case, where the verdict of the jury prohibits the imposition of ex-

emplary damages, that the value of the ores when separated from the mines should be taken as a just measure of Armstrong's actual injury, rather than their value at the mill, or indeed the value of the gold and silver extracted, except that the first is a nearer approach to the true measure than the last. The question should be, and is, how much Armstrong lost by reason of defendant's wrongful acts complained of. It is alleged in the complaint that the mines were, and are, valuable only on account of the metalliferous ores of gold and silver imbedded therein; that but for the wrongful acts of defendant, Armstrong would have had and received all of said ores to his own use, under and by virtue of said lease. In other words, if defendant had not extracted the ores, Armstrong would have done so. If defendant had not expended his money in mining the ores Armstrong would have expended his own. So, too, it might be added that if defendant had not taken out the ores, transported them to the mill, and there separated the precious metals from the earth, in all probability Armstrong would have done so. He could not have realized any profits under his lease without sub-letting or working the mines himself. There is no allegation that defendant deprived him of the former privilege, and had he worked the mines, it is certain that the cost of mining the ores would have been an expense to him, as well as the transporting and milling, and that in ascertaining his profit, or the value of his estate under the lease, he necessarily would have deducted the first, as well as the second and third item of expense mentioned. If our object is to ascertain Armstrong's loss by reason of defendant's wrongful acts, we must, it seems to us, in this action, begin with the first act complained of, the unlawful entry, and compare Armstrong's rights and interests at that time, with what they were after the termination of the wrongs stated. We must confine our view to the condition of the property and the extent of Armstrong's property rights when their value was the measure of Armstrong's actual loss, rather than their value on a subsequent day, when the ores, instead of representing such loss, had been appreciated by defendant's labor.

It was a matter of no practical importance to Armstrong whether defendant dug, carried away and milled the ores,

or destroyed them in the mines. In either case his loss would have been the same. The conversion of the ores was only an intermediate act in a series, which accomplished the destruction of his property as it existed at the time of defendant's entry and the commission of the acts complained of. Had the ores been mined by Armstrong before defendant carried them away, Armstrong's loss must have been greater than it was after they had been mined by defendant. If so, the combined acts of defendant, in mining the ores and taking them away, were not as detrimental to Armstrong's interests as the last act alone would have been after the former had been performed by him. But it is said that the judgment is right, because Armstrong was entitled to the ores when separated from the mine; because he could have recovered them in specie; because defendant was a trespasser and as such can not receive anything for his expenditure. But, admitting all these things except the conclusion stated, if our object is to find Armstrong's actual loss, how do they all show that he or plaintiff should receive in damages not only the value of the ores as they were before defendant's entry, all either could have realized had he worked them, and as much more as was the cost of mining, but also that defendant should lose twice the expenses incurred? How can such a rule be justified in this action, when in trover or replevin the rightful owner, as a general rule, can recover only the value at the time of conversion, with interest, although the property has been appreciated in value by the labor of defendant? The same argument was used in the latter cases, in favor of giving the whole value to the plaintiff if the property was wrongfully taken from him, however innocent the acts of the defendant may have been. But this and many other courts have decided against such a rule, as unreasonable, unnecessary and unjust. The same courts have said that in replevin the rightful owner should have the property if he can get it, although appreciated in value by defendant; not because he can justly claim the whole, but because he is entitled to his own, and generally, in such cases, he can not get that without taking what has been added at the expense of the wrong-doer; that in such case the latter must lose, however innocent he may have acted; but that if the property

can not be returned, and damages have to be given for the wrong, there is no difficulty in doing justice to both parties, allowing the rightful owner his actual losses, and the other his expenses, in whole or part, as the appreciation may permit. In replevin, the property is at all times the plaintiff's, if it was so when taken, no matter how greatly appreciated in value; at all times he has a right to recover it in specie, and the defendant is a continual trespasser so long as he retains it. Then, if the property can not be returned, why not give its increased value with as much propriety and justice, as in this action, to measure plaintiff's damages by the value of the ores when separated from the mine? We are unable to find any distinction in principle between the two cases. In both, plaintiff is only entitled to his actual loss. In neither is it necessary to give him more in order that he may have what belongs to him; and in both, if more is given, the plaintiff is allowed a profit by reason of an innocent misadventure of defendant.

It often happens in deserted mining towns that buildings become useless except to be taken down and removed to some other locality. In such cases they might easily be more valuable when taken down than they were when standing. Suppose, under such circumstances, in the honest belief that a certain building belongs to him, A should take down the house of B, and appropriate the lumber to his own use; that it was worth one thousand dollars before it was taken down, and the lumber one thousand two hundred and fifty dollars afterward. Suppose again that C, in the same belief that another house adjoining, and of the same value, belongs to him, burns and destroys it. It turns out that the house claimed and burned by C, also belonged to B; B brings an action against each, alleging in the first case an unlawful entry, the tearing down and carrying away, etc., and in the other an unlawful entry, the unlawful burning and destruction. In the latter case it is certain that the maximum limit of recovery is the amount it would cost to replace the building, and it would not be that much if such cost would exceed its value. The value of each building was the same to B, and in each case, as to him, the result of the unlawful acts of A and C, respectively, is the destruction of his property. Can it be possible, because A took his down and carried away the lumber, thereby increasing its

value, instead of destroying it, that B can recover of him one thousand two hundred and fifty dollars, and only one thousand dollars from C?

In *Harvey v. S. S. M. Co.*, 1 Nev. 543, appellant claimed error, because the court below refused to instruct the jury to give him what it would cost to remove from his lot dirt and rocks piled thereon by defendant. This court sustained the lower court, and stated in substance, that in some cases appellant might recover the amount it would cost to restore the property to the condition it was in before the wrong committed; but in cases where such cost would exceed the value of the property, the last amount only could be given in damages. In other words, plaintiff was not entitled to receive an amount greater than the value of the property destroyed by the trespasses of the defendant. So, in this case, if it were possible to replace the ores in the mines, as they were before defendant's entry, it is difficult to perceive how plaintiff could recover an amount greater than their value in place, if the cost of replacing them would exceed such value, or how he can now recover more than such value, although, from the character of the property, they can not be put in their former position. If defendant had innocently flooded one of the mines in question and worked the other, so that Armstrong could not take ore from either, should not the same rule of damages govern each case? Three men own adjoining claims in a marble bed; A and B, by mistake, work over the lines upon the property of C; each takes out and appropriates to his own use the same number of perches of the same value in the bed; A takes his in small blocks, and consequently expends less than B, who at great cost gets out large, valuable blocks, to be used in public buildings. The actual damage done to the marble bed is the same in each case, but the blocks separated by B are, in aggregate, as much more valuable than those taken by A, as B's expense of separation was greater than A's. It seems plain to us that in separate actions like this the same rule of damages should govern both cases. With apparent candor it is urged by counsel for plaintiff that, if the cost of mining may be deducted from the gross yield of the ores, it must follow if Armstrong had taken possession of the ores without action, that defendant could have recovered from him the

amount of such cost. We answer this statement of counsel by referring to what has been said in relation to the right of the owner of property to have it returned, if a return can be had, in an action of replevin. The rule and the reasons therefor are the same here as there. That every person has the right to use and manage his own property as he deems proper, so long as he does not injure others, can not be doubted ; but it must often happen that one man will, by mistake, overstep his line and trespass upon the rights of another. When such is the case our sense of justice and the law of the land declare that, as nearly as possible, the injured party shall be restored to his former condition, or compensation in damages shall be made. The wrong-doer shall make good the loss, but beyond that he shall not suffer for a wrong committed but not intended. We have endeavored, thus far, to consider this case upon well settled principles, without particular reference to the decided cases. Let us now look at the decisions upon this and kindred questions.

Our attention is called to the following cases by counsel for respondent : *Kier v. Peterson*, 41 Pa. St. 357, an action of trover for fifty thousand gallons of petroleum, which was the unexpected product of certain salt wells which had been sunk by defendant on land leased to him by plaintiff for the purpose of manufacturing salt. The court held that the petroleum belonged to the defendant, and hence did not consider the question of value, in relation to which there was no contest. Woodward, J., concurred in the judgment on the sole ground that plaintiff had misconceived his action, and alone remarked that he thought the judge below correctly comprehended the measure of damages ; that "plaintiff was not entitled to the labor of defendant but only for the value of the oil at the instant of separation from the freehold." It is probable that the court might have so held in that case, had the petroleum belonged to plaintiff, for the reason that the defendant had expended nothing on account of that ; he would have been to the same expense and trouble for the salt. *Martin v. Porter*, 5 M. & W. 353, was trespass for breaking and entering plaintiff's close, a coal mine, by mistake, and digging and carrying away coal. It is similar to this case, and so far as we know, has been, and is, the foundation of the rule, among

the decisions, claimed by counsel for respondent. Such being the case, and the leading opinion being short, we give it entire :

"**LORD ABINGER**, C. B.—I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he now claim to deduct it? He can not set up his own wrongs. The plaintiff had a right to treat these coals as a chattel to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail." Barons Parke, Alderson and Maule agreed upon the grounds stated by the chief baron. It will be seen that this decision, like all that follow it, was based upon a principle not accepted by this court, viz.: "That if the owner can not obtain his property in specie, he is entitled in all cases to the increased value."

Morgan v. Powell, 3 Adol. & E., N. S. 281, from the printed report, appears to have been similar to *Martin v. Porter*, although it is stated in *Cushing v. Longfellow*, 26 Me. 310, to have been an action of trespass *de bonis asportatis*. However, the court followed the rule adopted in the former case; Lord Denman C. J., and Patterson, Williams and Coleridge, JJ., sitting in banc. The case was first heard before Coleridge, J., at the Monmouthshire assizes in 1841, at which inquiry he stated that he felt bound by *Martin v. Porter*, though he expressed a doubt as to its correctness, and in a note to the case we find the following: "By a short-hand writer's notes, his lordship appears to have said: 'But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been to put him in the same position as he would have been if the coal had never been stirred.'"

In "*Bainbridge on the Law of Mines and Minerals*," marg. p. 514, the author says, in substance, that in actions of trespass for working beyond the boundaries of mining claims, the

measure of damages is the full value of the minerals as soon as they are separated from the freehold; and, as authority for the rule, he refers to *Hilton v. Woods*, L. R. 4 Eq. 432; *Maye v. Yappen*, 23 Cal. 306; *Goller v. Felt*, 30 Cal. 481; *Coleman's App.* 62 Pa. St. 278; *Bennett v. Thompson*, 13 Ired. (Law) 146; *Lykens Co. v. Dock*, 62 Pa. St. 232. An examination of the cases cited will show that *Maye v. Yappen* and *Bennett v. Thompson* are the only ones that in any manner sustain the rules stated by the author. But on p. 448 he says that, in equity, if there is no fraud or culpable negligence, compensation will be confined to actual profits accruing, or which might have been fairly acquired from the trespass; that the market price of the minerals at the month of the mine will be taken, and all just allowances be made for the costs of working. So it seems that the courts of equity in England, being untrammelled by forms, give as the actual damages in such cases the gross proceeds, less the necessary expenses of working, including the cost of mining. *Wild v. Holt*, 9 M. and W. 672, follows *Martin v. Porter*.

The above are all the English authorities to which we have been referred bearing upon this question in favor of respondent's position, and all that we have been able to find. The American cases cited by counsel for respondent are: *Cushing v. Longfellow*, 26 Me. 310, which was an action of *trespass de bonis asportatis*. The court held that the value of the logs sued for, at the time they were severed from the freehold, was the true measure of damages; that they then became a chattel, so that *trespass de bonis* would lie for them. The form of the action evidently effected the result. The last part of the decision is instructive, at least, as tending to show the growing inclination of courts to do justice by giving actual compensation for damages, sustained *Bennett v. Thompson*, 13 Ired. 148, follows *Martin v. Porter* and *Morgan v. Powell*, no other authorities being cited, and no reasons for the rule being given. The same is substantially true of *Smith v. Gondor*, 22 Ga. 353. *The Chicago Dock Co. v. Dunlap*, 32 Ill. 210, may be entirely correct, but it is not in point in this case. Sedgwick on Dam., marg. p. 536 *et seq.*, is also referred to by counsel for respondent. The author there gives the English doctrine as laid down in *Martin v. Porter*, but in

a note at p. 538 denies that such is the true rule, and strenuously adheres to that enunciated in *Forsyth v. Wells*, 41 Pa. St. 291. We can not regard either *Maye v. Yappen*, 23 Cal. 306, or *Goller v. Fett*, 30 Cal. 485, as an authority giving the rule in that State. The first does, indeed, come to the conclusion contended for by respondent, but we are unable to comprehend how such a conclusion was arrived at, after reading other portions of the opinion. In the last case, the court say: "The court erred also in refusing to permit defendants to prove the expense of digging the gold-bearing earth. The point was directly adjudged in *Maye v. Yappen*, 23 Cal. 306." Sawyer, J., justly distinguished for his painstaking, concurs in the reversal on the sole ground that defendant should have been permitted to prove the expense of digging the gold-bearing earth. But, as already observed, in *Maye v. Yappen*, the court adopted a rule directly opposite the one declared correct in *Goller v. Fett*, and yet the decision in the latter case seems to have turned upon the former. There is a mistake somewhere, and we can only disregard both.

Our particular attention is still called by counsel for respondent to the case of *The Barton Coal Co. v. Cox*, 39 Md. 3, decided in 1873. The facts of that case were similar to those presented in this, and the decision is favorable to respondent's theory.

The declaration in that case, however, was somewhat different from the complaint in this. It contained three counts. The first charged that the defendant broke and entered the *locus in quo*, and mined and carried away large quantities of coal; the second and third set out the trespasses with greater minuteness, and charged that defendants then and there took and carried away and converted the coal to their own use. The court says: "The declaration contained three counts, which, so far as the distinctive forms of action can be recognized in our present system of pleadings, may be designated as trespass *quare clausum fregit et de bonis asportatis* combined." So, it is evident that the pleading in that case allowed the adoption of such a rule of damages as the court deemed proper in an action of trespass *de bonis*, while there is not such a count in the complaint in this case. Although we can not know what the decision would have been had the declaration there

been like the complaint here, we shall assume that it would have been the same if the second and third counts had been omitted, or if the second and third had been combined with the first. In the first place, the court holds (p. 22), that in an action of trover, where there is no fraud or culpable negligence, the plaintiff may recover the enhanced value of the material either at the place of taking or manufacture, a conclusion that finds no concurring opinion in this court. Had the court been of different mind upon that important question, it is improbable at least that it would have arrived at a similar decision upon the question under consideration. After stating that there is a diversity of opinion between the English and American cases, and that the latter cases are not uniform, the court cites *Forsyth v. Wells*, 41 Pa. St. 291; *Herdie v. Young*, 55 Id. 176; *U. S. v. Magoon*, 3 McLean, 171; *Goller v. Fett*, 30 Cal. 482; *Coleman's Appeal*, 62 Pa. St. 278; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 84; all of which are strongly against the decision made. The court then says: "In the absence of any adjudications in this State on the question, and the conflict of authorities in others, we must endeavor to deduce the principles which should govern in cases of this character from a condensed statement of a few leading cases in England, where this species of property has long been the basis of national wealth, and often the subject of judicial consideration."

The court then cites *Martin v. Porter*, *Morgan v. Powell*, and *Wild v. Holt*, and decides the case according to the rule adopted by the English cases cited. No reasons are given for preferring the rule followed in the English cases rather than in the American; but the decision seems to have been based solely upon the ground that the rule adopted had been declared to be the correct one by some of the English courts. As an authority, the case adds to the English decisions the approval of the Maryland court, which we highly respect although unable to follow its example. *Robertson v. Jones*, 71 Ill. 405, was similar to this case. The Appellate Court held that the measure of damages for coal taken by defendant upon plaintiff's land was its value as a chattel when first severed from the mine. The foundation of this decision was also laid in a rule which, in *Ward v. Simpson*, we said, "was not support-

ed by sound reason or sustained by the weight of decided cases, and hence should not be followed." That court recognized as correct the rule that in trover and replevin the plaintiff may, in the absence of fraud, etc., recover in damages the appreciated value of the property taken, because he may recover the property in specie if a return can be had, and then adds: "The moment it, the coal, was severed from the freehold, a right of action then existed in favor of appellant. If he could maintain replevin, and recover the coal severed from the land, and upon this there can be no doubt, upon the same principle, in an action of trespass, he has a right to recover the value of the coal after it was dug in the bank."

In the *McLean County Coal Co. v. Long*, 81 Ill. 359, an action of trover for the conversion of coals taken from the land of plaintiff, the controversy was as to the proper measures of damages. The court followed *Robertson v. Jones, supra*, holding that the rule was the same in trover as trespass. Then, as the rule in trover is different here, so it may differ in trespass. Let us now turn to some of the cases wherein the rule contended for by appellant has been adopted. *Wood v. Morewood*, was tried at the Derby assizes in 1841, before Parke, B. The declaration contained a count in trover for coals taken, and another for damages for injury to plaintiff's reversionary interest in the land. The baron presiding, who had participated in the decision in *Martin v. Porter*, instructed the jury, "that if there was fraud or negligence on the part of defendant they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*, but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal fields had been purchased from the plaintiff." The latter rule was adopted by the jury, and the decision was acquiesced in.

Hilton v. Woods, L. R. 4 Eq. 438, was decided by the vice-chancellor in 1867. He preferred the rule of *Wood v. Morewood*, to that of *Martin v. Porter*, and followed the former.

Although from the printed reports it appears that the two

cases last mentioned were similar, yet, on the other hand, it seems improbable that Baron Parke, in the latter, would have disregarded the rule established by the former, in which he participated, if in that case there was no fraud or culpable negligence.

Barnsley Canal Navigation Co. v. Twibill, Vol. 3, English Railway Cases, 356, is of interest in this connection. Under the Canal Act, a canal company purchased the land over which the canal passed, but the coal mines and coal were reserved to the owners, who were to be at liberty to work the mines so as not to injure the canal. A, the owner of the land over which the canal passed, sold it to the company, and afterward leased the coal up to the side of the canal on one side, and up to the towing-path on the other, to B. A subsequently contracted with the company for the sale to them of the coal under the canal and towing-path, and eight yards on each side, which they required for the safety of their canal. It was decided by the court, "that B was entitled to compensation in respect of the interest in the coal which he had acquired under the lease, viz., the profit to be derived from the coal when gotten, after deducting the expense of getting." See, also, *Mayne on Law of Dam.*, 227, 228; *Chipman v. Hibberd*, 6 Cal. 162.

Stockbridge Iron Co. v. Cone Iron Co., 102 Mass. 86, was an action of tort praying for relief for injury to plaintiff's land by digging a shaft on adjoining land occupied by defendants, and thence digging into and under plaintiff's land and taking therefrom large quantities of iron and other ores. Plaintiff also prayed for an injunction. The court held that it was entitled to recover "the value of the ore, to be estimated as it lay in the bed, and not as it was after the defendants had increased its value by removing it."

In *U. S. v. Magoon*, 3 McLean, 171, the court instructed the jury "that the value of the ore after its separation from the mine was not the measure of damages, but the injury done to the soil; that the digging and carrying away by the same person is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil."

Mr. Sedgwick, in discussing this question (p. 273), says: "The principle to be extracted from these cases is, that in tres-

pass, if the defendant has in good faith increased the value of the property, the plaintiff shall not have the benefit of his labor; and this appears to be the rule in this country." See *Weymouth v. C. & N. W. R. Co.*, 17 Wis. 551; *Single v. Schneider*, 24 Id. 300; Id. 30; Id. 570; *Winchester v. Craig*, 33 Mich. 207; *Folsom v. Apple River Log-driving Co.*, 41 Wis. 608.

Forsyth v. Wells, 41 Pa. St. 291, was an action of trover for coal mined upon and carried away from the land by mistake. Plaintiff claimed, as in this case, that because the action was allowed for the coal as personal property, by necessary logical sequence, she was entitled to the value as it lay in the pit after it had been mined. The court say: "It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of the conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we can not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still, the fact that the form is for the sake of the principles, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. * * * When the taking and conversion are one act, or one continued series of acts, trespass is the most obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. * * * But when the law does not allow this departure from the strict form, it is not in order to enable the plaintiff by his own choice of action to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much."

The court then states that in an action of trespass it prefers the rule adopted in *Wood v. Morewood* to that of *Martin v. Porter*, for the reason that the former gives just compensation for actual damage, while the latter does not, and adds: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the

purpose of all remedies, and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits." 7 Casey, 456.

Herdie v. Young, 55 Pa. St. 177, was replevin for logs cut by defendant by mistake on plaintiff's land. The logs were driven to the boom by defendant and there replevied. The court say: * * * * "As remarked by Lowrie, C. J., in *Morrison v. Robinson*, 7 Casey, 458, our natural sense of justice furnishes the ground and measure of compensation for injuries done by one man to the property of another and demands adequate remedy to obtain it. In trespass for mesne profits, compensation was therefore held to be the measure of damage, and the defendant will be allowed for the value of permanent improvements erected by one whose title he has bought. * * * * Such compensation merely would have been the standard in this case had ejectment or trespass *quare clausum fregit* been brought instead of replevin. The value of timber on the ground would have measured the mesne profits. Upon principle and analogy, it is unjust to give to the plaintiff the advantage of the labor and expense of the defendant's cutting and hauling the logs and driving them to the boom. Yet, if we confine our view to the condition of the property at the time of the replevy, instead of going back to the time of the taking, this would be the mere effect of a change in the form of action, and not of an alteration of the circumstances. * * * In case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this (the true standard of damages) would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, hauling and driving to the boom." See, also, *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232, and *Coleman's Appeal*, Id. 278.

A careful examination of the authorities has convinced us that there is a growing inclination among all courts, where it

can be done, to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is, to give the injured party as near compensation as the imperfections of human tribunals will permit. This is the aim, the ideal, of the law, and it is the duty of courts to come as near it as possible in practice; and although courts differ as to the method of ascertaining the actual loss, as well as to what constitutes actual loss, still there is a refreshing unanimity of opinion that such loss only, when ascertained, ought to be compensated in the absence of fraud, malice or culpable negligence.

We are satisfied that the weight of authorities sustains the views of counsel for appellant upon this important question, and that they are sanctioned by every sense of reason and justice. The court erred in refusing to allow defendant to prove the necessary cost of mining the ore in question, and for this error the judgment is reversed.

Reversed.

TROTTER V. MACLEAN.

(L. R. 13 Ch. D. 574. Chancery Division of the High Court of Justice, 1878.)

¹**Measure of recovery in inadvertent trespass different from the measure in deliberate trespass.** A colliery commenced to work adjoining coal owned by trustees in the expectation of a contract under negotiation, giving notice when about to commence the work. *Held*, that the working, though no contract was afterward entered into, and the trustees had no power to make one, ought to be treated on the same footing as if commenced inadvertently, and upon taking an account the defendant was allowed the cost of severing the coals, as well as the cost of bringing them to bank. But from the time notice was given to defendant that no contract would be made, his working was treated as fraudulent, and he was allowed only the cost of bringing the mineral to bank.

²**Statute of Limitations—Burden on defendant.** So long as a wrongful working is to be treated as inadvertent the Statute of Limitations applies, and an account will be restricted to six years prior to the going of the writ; but the *onus* was, in this cause, put upon the defendant to show that the minerals gotten by him during the interval in controversy were gotten before the six years.

¹ *Waters v. Stevenson*, 10 M. R. 240.

² See *Williams v. Pomeroy Co.*, 6 M. R. 195; *Lupton v. White*, 2 M. R. 430; *Dean v. Thwaite*, 1 M. R. 77.

¹ **Diary memoranda.** An entry in a diary kept by an agent is not admissible to prove a fact therein stated unless it is shown that it was the duty of the agent to make the whole entry.

² **Proof of mailing letter.** A witness produced a copy of a letter, which, he said, was made by him, and swore that he should in the ordinary course of business have posted the original. *Held*, that this was evidence of posting, and that the original not having been produced, the copy was good secondary evidence.

Insufficient suspensory offer—Costs. The solicitors of defendant wrote to the plaintiff's solicitors that they were prepared to advise defendant to settle on certain terms. *Held*, that this was not such an offer as would free the defendant from liability to the subsequent costs of the action inasmuch as he might have refused to follow the advice of his solicitors.

The plaintiffs were H. J. Trotter, G. D. Trotter, T. L. Trotter and H. H. Trotter, the trustees of the will of William Trotter, who died on the 6th of February, 1866. The first two plaintiffs were original trustees of the will; the other two had been appointed subsequently under a power in the will. One of the original trustees was W. D. Trotter, a son of the testator. He was a solicitor, and after the death of the testator he acted as a trustee and also as solicitor to the trustees. He and the other sons of the testator had, under the will, an option to purchase any part of his real estate at a valuation. The will gave the trustees no power to lease the coal under the trust property, or to sell it separately from the surface. W. D. Trotter died in the year 1875. Part of the trust property consisted of some closes of land in the county of Durham, adjoining to a colliery, called the Woodhouse Close Colliery. In the year 1871, and for some time afterward, this colliery belonged to and was in the occupation of the defendant, Sir Charles Maclean. Mr. Richard Heckels acted as viewer and manager of the colliery for him. Heckels died in February, 1877. The writ in the action was issued on the 20th of April, 1878. The statement of claim alleged that the defendant, while in possession of the colliery, without any license or authority, and without the knowledge of the trustees, or any of them, secretly and knowingly trespassed on the plaintiffs' adjoining closes of land, and wrongfully worked by secret underground workings connected with the Woodhouse Close Colliery, and removed a quantity of coal from under the plaintiffs' closes. It was alleged that none of the plaintiffs, or of the trustees for

¹ *Franklin Co. v. McMillan*, 10 M. R. 224.

² *Breed v. First Nat. Bank*, 6 Colo. 235; *Montelius v. Atherton*, Id. 224.

the time being of the will, had any knowledge of the defendant's working before the 22d of January, 1877. The plaintiffs claimed a declaration that the defendant was chargeable to them in respect of all coals gotten by him under their closes of land; an inquiry what coals had been gotten or removed by the defendant; an account of their value, and payment of the ascertained value to the plaintiffs.

By this statement of defense the defendant alleged, that in October, 1871, an agreement for the purpose of working the coal under the plaintiffs' closes of land was entered into between W. D. Trotter as the solicitor and agent of the trustees, and on their behalf, and Richard Heckels on behalf of the defendant; and that in pursuance of that agreement the coal was worked by the defendant from October, 1871, until October, 1872. And the defendant claimed the benefit of all statutes for the limitation of actions as a bar to the relief claimed by the plaintiffs.

By the evidence adduced at the trial it appeared that in the year 1871 some negotiations took place between W. D. Trotter and Heckels, with the view to the granting to the defendant of a license to work the trustees' coal. On the 28th of October, 1871, Heckels wrote to W. D. Trotter, as follows:

"After being with you yesterday morning, when we arranged that your coal had to be worked at Woodhouse Close Colliery, Sir C. Maclean paying for it as worked at the rate of 18s. per ton, and also paying 2s. per ton on any coal he brings through your freehold, I wrote up to the colliery and instructed the resident party in charge of the work to 'fire away' (drive) into it. I trust it may be all found in a workable condition, and you may rest assured that my best endeavors shall be used not to lose one inch of it."

After this the plaintiffs' coal was worked on behalf of the defendant, Maclean, until October, 1872, when he discontinued the working. On the 23d of July, 1872, W. D. Trotter had written to Heckels as follows:

"I find my father's trustees have no power to lease coal, and there are certain difficulties in the way which prevent myself and my brothers exercising our pre-emption clause just at present, so that I fear it is impossible for me to enter into

terms for the lease or sale of the coal under my father's land, at any rate for the present."

On the 24th of July, 1872, Heckels replied as follows:

"TROTTERS' COAL.

"Am I to understand you wish the working of this coal at Woodside Close Colliery abandoned? I have caused money to be spent in getting into it, and to the present time but very little coal has been worked from the property."

W. D. Trotter replied, on the 25th of July, 1872, as follows:

"I really have no wish in the matter, but, as things at present stand, we have no power to sell or lease the coal, and I find it will involve such a large expense to obtain power, I doubt whether it is worth while. Probably the matter had better stand over till next we meet."

On the 5th of August, 1872, Heckels wrote to Mr. Iliffe, Maclean's solicitor, as follows:

"I inclose you copies of letters from Mr. Trotter, dated 23d and 25th ult., and my reply to the former. I am going on working this coal partially. I imagine Mr. Trotter does not object to my doing so. What is your advice in the matter?"

On the 7th of August Mr. Iliffe replied:

"I am uncommonly sorry to find that there is a difficulty with regard to Mr. Trotter's coal. * * * I, however, concluded that Mr. Trotter, as a lawyer, would not have entered into the arrangement with you unless he had known that he could do so legally. I think you and Sir Charles have reason to complain that he did not know of his powers to conclude an agreement; but we are dealing with a gentleman who will not take improper advantage of the mistake. It does not appear that he objects to what has been done, though he thinks it best that matters should remain as they are. There can, I suppose, be no objection to your using the communication you have made through Mr. Trotter's coal to the shaft. This liberty was, I believe, one object you wish to acquire in working Mr. Trotter's coal, and as no injury can arise to the family, but pecuniary benefit in the way of rent, you will of course arrange for your enjoying this way of access, though you do not further work the coal."

NORTH, Q. C., and J. RIGBY, for the plaintiffs.

The defendant has not proved the agreement with the trustees which he alleges. The Statute of Limitations only began to run when he discovered the unlawful acts, that is, in January, 1877. There was no laches on our part: *Ecc. Com. v. Northeastern Railway Co.*, 4 Ch. D. 845. In *Dean v. Thwaite*, 21 Beav. 621, there had been no fraud; the coal had been taken unintentionally. A man may secretly remove the coal from under his neighbor's land, who has no means of discovering what is being done. Surely the Statute of Limitations can not apply to such a case. Secretly taking your neighbor's coal in itself amounts to fraud, though of course if it is taken in ignorance, there is no fraud. The limitation of six years may well apply in the one case, but not in the other. The principle of the Statute of Limitations is that there has been laches on the part of the person who is suing, and there can be no laches when that which is done is done underground where it can not be discovered.

FRY, J., referred to *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39, as showing that fraud is not an answer to a plea of the statute.

Ecc. Com. v. Railway Co., 4 Ch. D. 845, shows that the defendant ought not to be allowed the cost of severing the coal. The other authorities on the subject were fully discussed in that case. It can not be said that the defendant worked the plaintiffs' coal with a *bona fide* belief of a title to do so. The negotiations with W. D. Trotter never resulted in an agreement, and the trustees could not give the defendant a title. The defendant took his chance of getting a title. He is bound to show a justification for his working; it is not enough to show there was a probability that he might be justified.

FRY, J.—In *Hilton v. Woods*, Law Rep. 4 Eq. 432, it was held that the defendant, who had worked the plaintiff's coal inadvertently, was only to pay the fair value of the coal as if he had purchased the mine.

Inadvertently can only apply to a mistake of boundaries. In that case there was a *bona fide* belief of title. There could not be any such belief in the present case, at any rate after the letters of the 23d and 25th of July, 1872. The principle of

the decisions is that the true owner is entitled to the value of the coal as a chattel at the time when the trespasser began to take it away, that is, as soon as it existed as a chattel: *Martin v. Porter*, 5 M. & W. 351; a court of equity is not bound by the Statute of Limitations in regard to merely equitable right, though it may act by analogy to the statute. The equitable demand for compensation in an action like the present is quite a different thing from damages in an action of trespass.

FRY, J.—The measure of damage is the same.

That is a mere accident. *Ex parte Adamson*, 8 Ch. D. 345, illustrates the difference between legal and equitable liability. There is no moral distinction between a wrongful taking of coal and any other theft, though there is a great distinction between taking the coal intentionally and by mistake. Even then the result would be the same to the real owner. In a court of equity the question is one of conscience. A reckless dealing with your neighbor's property, though by a mere technicality of law it is not larceny, yet in the view of a court of equity is equivalent to it. The Statute of Limitations does not apply, and the account ought to be taken during the whole period of the defendant's working according to the harsher rule, not allowing him the cost of severing the coal.

COOKSON, Q. C., and W. S. OWEN, for the defendant.

Mr. Heckels, Jun., a nephew of Richard Heckels, who had assisted him in the agency business of the defendant, was called, and produced a diary which he said had been kept by his deceased uncle. He said that his uncle kept the book in a desk in his office.

Owen proposed to prove by means of an entry in this diary what took place at the interview between Mr. Heckels and Mr. W. D. Trotter on the 27th of October, 1871.

NORTH, Q. C., objected.

OWEN.—The entry is admissible as a declaration by a deceased person, it being made in the course of his business: Taylor on Evidence, 7th Ed., Vol. P, 599.

FRY J.—According to what is laid down there I must be satisfied, not merely that the entry was made in the usual routine of business, but that it was the duty of Mr. Heckels to make the whole of it.

It is the duty of a man of business to make such entries that he may be able to report to his principal.

NORTH, Q. C.—The evidence is inadmissible; there is nothing to show that it was the duty of Heckels to do the particular thing to which the entry relates, and then to make a record of it: *Smith v. Blakey*, Law Rep. 2 Q. B. 326.

OWEN in reply.

FRY, J.—I reject the evidence on the ground that it is not shown that there was any duty on the part of Mr. Heckel to make the entire entry.

The original of the letter of the 28th of October, 1871, not being produced by the plaintiffs on notice, the defendant's counsel proposed to prove it by means of a copy.

Mr. Heckels, Jun., produced a copy of the letter which he said had been made by him at the time. He also said that though he did not remember posting the letter, he had no doubt that he would have done so in the ordinary course of business.

NORTH, Q. C.—I object to the admission of the copy. We have no such document in our possession. It ought to be strictly proved that the letter was sent.

FRY, J.—It appears to me that there is some evidence of the posting of the letter, though it is weak. The witness says that in the ordinary course of business he would post the letter. I must, therefore, admit the copy.

COOKSON, Q. C. and W. S. OWEN, for the defendant.

It is clear from the letter of the 28th of October, 1871, that some agreement had been come to between Heckels and W. D. Trotter. The latter was himself one of the trustees, and was the solicitor of the trustees, and Heckels might well, and no doubt did, believe that he had power to bind his co-trustees. At any rate he acted in the *bona fide* belief that a lease would be granted by the trustees, under which the defendant would acquire a good title to work the coal. There was nothing fraudulent or secret in what he did; there was only a mistake or inadvertence. No doubt a fraudulent concealment might prevent the Statute of Limitations from running, but there could be no fraud when the working was actually known to one of the

trustees. No doubt in a court of equity the time only runs from the discovery of a fraud or mistake, or from the time when it might have been discovered, if reasonable diligence had been used: *Brooks Bank v. Smith*, 2 Y. & C. Ex. 58; *Ecc. Com. v. Northeastern Railway Co.*, 4 Ch. D. 845; but here, as one of the trustees knew what was being done, the others might have discovered it if they had used reasonable diligence.

FRY J.—In the latter case Vice-Chancellor Malins said (*Ibid.*, 860) that “for the purposes of the statute, the breaking of bounds into your neighbor’s colliery must be considered a fraudulent act.”

That *dictum* is not borne out by the other authorities. Fraud is not an answer to a plea of the Statute of Limitations at law: *Hunter v. Gibbons*, 1 H. & N. 459.

FRY J.—The question there was merely whether, under section 85 of the Common Law Procedure Act, 1854, fraud could be replied as an equitable answer to a plea of the statute.

The nature of the jurisdiction of the court of chancery in mining cases is explained by Lord Hardwicke, in *Jesus College v. Bloom*, 3 Atk. 262, 264. It was part of the general jurisdiction in matters of account. But though the court of chancery had jurisdiction in such cases, the taking of a neighbor’s coal is not the less a trespass. In *Hunter v. Gibbons*, 1 H. & N., 465, Baron Alderson says that there is no distinction between an underground trespass and a trespass on the surface.

The reason for going to a court of equity was that it was difficult to satisfy a jury about underground workings; the quality of the act was the same. *Dean v. Thwaite*, 21 Beav. 621, shows that the statute applies when coal has been taken unintentionally, and there has been no attempt to conceal the fact. Section 26 of the act, 3 and 4 Will. 4 C. 27, prescribes the time from which the statute runs in a case of concealed fraud. A court of equity is within the spirit and meaning of the Statute of Limitations, and acts in obedience not merely by analogy to them: *Henden v. Lord Annesley*, 2 Sch. & Lef. 607, 630. The defendant is entitled to the benefit of the statute.

Then, as to the footing on which the account is to be taken, the principle of the cases is this, that when the coal has been

worked under a *bona fide* belief of title, the defendant is to have all just allowances, including the cost of severing the coal. That principle applies to the present case, where the defendant commenced working the plaintiffs' coal under a *bona fide* belief that he would obtain a license from them to do so, and gave their solicitor notice that he was about to commence working: *Hilton v. Woods*, L. R. 4 Eq. 432; *Jegon v. Vivian*, L. R. 6 Ch. 742, 760; *Phillips v. Homfray*, *Ibid.* 770; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188; *In re United Merthyr Collieries Co.*, *Ibid.* 15 Eq. 46; *Ashton v. Stock*, 6 Ch. D. 719; *Ecclesiastical Commissioners for England v. Northeastern Railway Co.*, 4 Ch. D. 845. *Phillips v. Homfray* was a case of actual fraud. In the present instance that which is called in some of the cases the "milder rule of law" ought to be followed.

NORTH, in reply.—At any rate after the letter of the 23d of July, 1872, the defendant's working could not have been *bona fide*. The Statute of Limitations does not apply, for the defendant did not begin working the coal inadvertently. He had nothing but an expectation that everything would be made right, and he deliberately took the risk of beginning before it was made right. It is not a sufficient excuse to say that one of the trustees had notice. The principle on which the cost of severance has been disallowed is that the act is a wrongful one, and a penalty ought to be inflicted on the wrong-doer. The defendant knew when he began working that he had not acquired any title to do so. The cost of severance ought to be disallowed: *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Wood v. Morewood*, 3 Q. B. 440 n. If this were an action at common law, it is not a case where the milder damages would have been given: *Phillips v. Homfray*, L. R. 6 Ch. 770; and the same rule should be applied here: *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46. I ask the court to follow, not to go beyond, the common law rule.

Fry, J., after stating the facts, continued.—The first defense is this: that in October, 1871, an agreement was come to between the trustees and the defendant for the leasing of the coal under the closes in question to him. If that agreement be proved he has a perfectly good defense to the action. The evidence in support of that contention consists mainly of a series of let-

ters. In the first place there is the letter of the 28th of October, 1871, which, upon the evidence before me, I hold to have been written by the late Mr. Richard Heckels, who was then the viewer of the defendant's colliery, and sent by him to Mr. W. D. Trotter, who was then one of the trustees and the solicitor of the trustees. That letter, however, does not appear to me to import the existence of an agreement. It undoubtedly imports that a conversation had taken place on the previous day between Mr. Heckels and Mr. W. D. Trotter, and that an understanding or arrangement had been then come to that Sir Charles Maclean should work the trustees' coal through his own workings, and should pay for it at a certain rate. But it does not appear to me that I can infer from that letter that there had been a bargain on Mr. W. D. Trotter's part that Sir Charles Maclean should have that right. It was rather the commencement of a negotiation, in which both parties so far had not differed as to the terms. On the evidence I come to the conclusion that Mr. Heckels, as well as Mr. W. D. Trotter, must have known that the trustees were necessary parties to any such bargain, and that no assent was ever given by any of the other trustees to the terms which were mentioned in the conversation between Mr. Heckels and Mr. W. D. Trotter. That conclusion is, in my judgment, very strongly confirmed by the subsequent letters written in July, 1872, when Mr. Heckels, on being informed by Mr. W. D. Trotter that his father's trustees had no power to lease or sell the coal, did not for a moment suggest that any concluded bargain had been come to between them in the previous month of October. No doubt payments were subsequently tendered of royalties on the footing of the alleged agreement. No payment, however, has ever been retained on the footing of the agreement, and looking at the circumstances, it does not appear to me that they can work any estoppel against the plaintiffs, and still less are they conclusive evidence of any bargain having been arrived at in October, 1871. Therefore, I come to the conclusion, as a matter of fact, that no bargain has been proved to have been made in that month. In fact the evidence goes to show that there was no such bargain.

The next question which arises is with regard to the Statute of Limitations. The defendant's workings began in No-

vember, 1871, and the six years before the issue of the writ began on the 20th of April, 1872. The question of the statute, therefore, applies only to the interval between November, 1871, and April, 1872. The statute, 21 James I, c. 16 s. 3, imposes the term of six years as the limitation in actions of trespass, and although the present proceeding is a proceeding in a court of conscience, it is undoubtedly in respect of a trespass, and it appears to me that the period of limitation imposed by the statute of James ought to apply to proceedings in this court in respect of a trespass, unless there be some equitable ground for repelling the application of the statute. Such an equitable ground has in many cases been found in fraud. When fraud or any other equitable circumstance exists, undoubtedly the statute will not apply.

Now were the entry and possession of the defendant in the present case and his trespass fraudulent? In my view they were not. I think that, although no agreement is proved to have been come to between him and the trustees in October, 1871, it is proved that there was a negotiation then, and that there was on both sides the expectation that a bargain or agreement would be arrived at, and, more than that, that there was knowledge in one of the trustees, which I must impute to them all, because it was his duty to communicate it to his fellow trustees, that immediately after the 28th of October, 1871, the coal under their land would be worked by the defendant. With that knowledge on the part of the owners of the coal, I can not, as it seems to me, without a violation of language, say that the defendant's entry was fraudulent. The intention to enter was disclosed, and no one could read the letter of the 28th of October, 1871, which I believe Mr. W. D. Trotter to have seen, without knowing that very shortly after its date, an entry would be made by the defendant on the coal in which the trustees were interested.

It has not escaped my attention that in the letter of the 24th of July, 1872, Mr. Hecke's represented that, up to that date, very little coal had been worked. I am not satisfied that that statement was a perfectly fair one, and I have doubted whether I ought not to consider that it made the previous entry fraudulent because it was in effect a concealment of the extent to which the working had been carried. But, looking at the

vagueness of the terms of that letter, and bearing in mind it was not set up by the pleading that that letter was fraudulent, and that, therefore, the attention of the defendant was not challenged to that point, I think I should be going too far if I were to decide that the trespass became fraudulent by virtue of the misrepresentation contained in that letter.

I find, therefore, no equitable circumstance which repels the application of the Statute of Limitations, and I hold that no account can be directed to the workings between the 5th of November, 1871, when they began, and the 20th of April, 1872, the commencement of the period of six years before the issue of the writ. But I shall apply the principle which Lord Romilly laid down in *Dean v. Thwaite*, 21 Beav. 621, and direct that, in ascertaining the amount of coal worked, all that has been worked shall be deemed to have been worked subsequently to the 20th of April, 1872, unless the defendant can prove the contrary.

The next question is, what allowances are to be made to the defendant in taking the account. Accounts in actions of this character in the court of chancery have been directed on two footings; sometimes an allowance for the cost of severance or getting the coal has been made, and sometimes it has not. In all cases an allowance has been made for the cost of bringing the coal to bank. In inquiring what allowances are to be made in the present case, a distinction must be drawn between the period from the 20th of April to the 23d of July, 1872, and the period subsequent'y to the 23d of July, 1872, because in that month of July a correspondence passed between parties which seems to me to be of the highest moment in answering the question what allowances are to be made. On the 23d of July, Mr. W. D. Trotter distinctly informed Mr. Heckels that his father's trustees had no power to lease the coal, and that he could not enter upon any terms for the lease or sale of the coal; and again, on the 25th of July he said that the trustees had no power to lease or sell the coal. It further appears that Mr. Heckels, on receiving these letters, was advised by the solicitor of his principal that he ought not to persist in taking any further coal; in other words, that any further taking of coal would be wrongful.

Now, what do the cases decide with regard to the severer or the milder rule? The cases are numerous, and I believe, with two or three exceptions, they have all been cited. The milder rule has been applied where the courts have said that the defendant has acted inadvertently in taking the coal; that is the language of Vice-Chancellor Malins in *Hilton v. Woods*, L. R. 4 Eq. 432. Again, it has been applied where the courts have said that the defendant has acted under a *bona fide* belief of title; of that *Hilton v. Woods*, *Jegon v. Vivian*, Id. 6 Ch. 742, and *Ashton v. Stock*, 6 Ch. D. 719, are examples. It has been applied again when the courts have said that the defendant has acted fairly and honestly; that was the language of Lord Wensleydale in *Wood v. Morewood*, 3 Q. B. 440 n.

It has been applied in cases of mere mistake; that is the language of Vice-Chancellor Bacon in *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46. The harsher rule has been applied where the courts have found fraud; of that there are numerous illustrations, one being *Ecc. Com. v. Railway Co.*, 4 Ch. D. 845. It has been applied where there has been negligence; that was the language of Lord Wensleydale in *Wood v. Morewood*, 3 Q. B. 440 n. It has been applied when the act of the defendant has been said to be willful; as in *Martin v. Porter*, 5 M. & W. 351. It has been applied where the court has said that the defendant has acted in a manner wholly unauthorized and unlawful, which was the language of Vice-Chancellor Bacon in *Llynvi Company v. Brogden*, L. R. 11 Eq. 188, and it was applied by Vice-Chancellor Malins in *Ecc. Com. v. Railway Co.*, where he thought the workings were the result of a mistake. But I find no case which throws any direct light on the question whether the harsher or the milder rule should be applied where there has been the *bona fide* expectation of a contract, and where there has been a knowledge on the part of the owner of the coal that that expectation would be immediately acted upon by an entry upon the property. But the observations of Lord Hatherly in *Jegon v. Vivian*, L. R. 6 Ch. 762, seem to me to throw light upon the way in which I ought to answer the inquiry in the present case. He said: "I think that the milder rule of law is certainly that which ought to guide this court, subject to any case

made of a special character which would induce the court to swerve from it ; otherwise, on the one hand, a trespass might be committed with impunity if the rule *in pœnam* were not insisted upon ; so, on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it." Those observations are very material in two ways. In the first place, they express the view of the lord chancellor, that the milder rule is to be assumed when the propriety of applying the contrary rule is not shown, and they throw the burden on him who asserts that the severer rule ought to be applied ; and so his language has been interpreted by Vice-Chancellor Bacon in, I think, more than one case. In the next place, Lord Hatherly points out that the milder rule should be applied where persons stand by and see their coal worked. Now, it does appear to me that in the present case one of the trustees knew as long ago as October, 1871, that the coal would be worked by the defendant immediately after that date, and that he did not interfere in any way to stop it, and that his acquiescence must be deemed to be the acquiescence of all, because there was a duty upon him to communicate to his co-trustees anything which required that they should take proceedings for the purpose of protecting the trust property. I therefore hold that, in respect of the interval between April and July, 1872, the milder rule must be applied.

But after the 23d of July, 1872, the defendant, through his agent, knew that he had no right to expect a contract with the trustees or to expect any title to the coal. He knew, therefore, that any subsequent working by him would be wholly unlawful and unauthorized ; it would be simply willful, and yet his agent continued to work the coal. It appears to me, therefore, that all the workings subsequent to the 23d of July, 1872, were of the willful description which I have mentioned, and that according to the cases, the severer rule should be applied to them.

One other question only remains for decision. On the 16th of May, 1879, the defendant's solicitors wrote to the plaintiffs, saying that they were prepared to advise Sir Charles Maclean to settle on certain terms. It is said that that was a proper offer, and that the costs of the action ought not to be

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given after that date. In my view it was not a proper offer. It was a mere statement of what they were prepared to advise their client to do, and their client might refuse to act on it. When defendants desire to stay their liability to costs in an action, they must make a clear, unconditional offer, equivalent to the whole right of the plaintiff at the time.

THE MCLEAN COUNTY COAL CO. V. LENNON.

(91 Illinois, 561. Supreme Court, 1879.)

¹**Trover for coal—Expense not allowed.** In trover, to recover damages for coals taken by defendant from the land of plaintiff without his consent: *Held*, that the measure of damages is the value of the coal at the mouth of the shaft less the cost of conveying it, after dug, from the mine to the mouth of the shaft without allowing anything for digging, or separating stone, slate, sulphur and earth from the coal, or for brushing the road.

²**When severance complete.** It is not to be considered as severed from the mass until it exists as the coal of commerce.

Appeal from the Circuit Court of McLean County; the Hon. JOHN BURNS, Judge, presiding.

STEVENSON & EWING, for the appellant.

TIPTON & POLLOCK, for the appellee.

BAKER, J., delivered the opinion of the court.

This was trover, by John Lennon, the appellee, against appellant, to recover damages for coals taken by it from the land of appellee and converted to its own use, without his consent. The case was tried before a jury, and a verdict was returned in favor of appellee for \$259. Judgment was rendered on the verdict, and this appeal was taken.

The principal question involved in the suit is as to the correct rule for the measure of appellee's damages for the coals taken by appellant.

¹See *Waters v. Stevenson*, 10 M. R. 240.

²See *Lykens Valley Co. v. Dock*, 8 M. R. 570.

Robertson v. Jones, 71 Ill. 405, was trespass for taking coal from a mine. We there said the plaintiff "has the right to recover the value of the coal after it is dug in the bank, or he could recover the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit. This rule is founded in justice, and seems to be sustained by the authorities."

We afterward, in the case of *McLean County Coal Co. v. Long*, 81 Ill. 359, applied the same rule for the assessment of damages in an action of trover, holding that in either form of action the plaintiff was entitled to compensation only for the damage he had actually sustained, unless it was a case of trespass calling for vindictive damages. We said: "For the expense and trouble of separating the coal from its kindred layers and making it a chattel, the defendant can not claim to be re-imbursed; but the coal had no value as a salable article without being taken from the pit, and any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth."

During the trial the Circuit Court had used this language: "I understand the measure of damages is the value of the coal at the time of the conversion. I think the measure of damages is the value of the coal at the mouth of the shaft, less the expense of drawing it up." We quoted this language and suggested that if the court had adhered in the instructions to the rule thus announced, it would have conformed to our views of the law and to former decisions of this and other courts. We said: "The court should have told the jury the plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft. This is, in effect, saying he can recover the value of the coal when it first became a chattel by being severed from the mass and under their control." We referred to the case of *Sturges v. Keith*, 57 Ill. 451, and announced the doctrine to be that the damages are to be estimated as the value when the chattel is converted.

In *Illinois Coal Co. v. Ogle*, 82 Ill. 627, which was an action of trespass, the court had instructed the jury to allow the plaintiff the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to

the pit mouth, allowing the defendant nothing for the digging, and the instruction was held to be correct, and the judgment was affirmed. We there quoted with approval this language of Lord Denman, in *Morgan v. Powell*, 43 Eng. Com. L. 734: "The defendant had no right to be re-imbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article without being taken from the pit. Any one purchasing it there, would, as of course, have deducted from the price the cost of bringing it to the pit's mouth." We again stated the rule for the assessment of damages, to be the value of the coal at the mouth of the pit, after deducting the cost of removing it from the place where mined to the pit's mouth.

The instructions of the court given in the case now under consideration are in conformity with the rule announced by us in the cases to which we have referred; the several instructions given inform the jury in substance that they should allow the plaintiff the value of the coal at the mouth of the shaft, less the cost of conveying it from where it was dug in the pit to the mouth of the shaft.

It seems the coal in controversy was mined by digging out the clay from under it, when the weight of the top would break it off. This left the coal in large masses, mixed with sulphur, slate, stone and clay. These masses had to be broken up and the sulphur, slate, stone and clay removed before the coal was in a condition to be put on the cars and run out to the shaft.

As we understand the claim of appellant, it is that the expense of breaking up these masses and removing the extraneous substances, and the time and labor of the miner in brushing his road should all be deducted from the value of the coal at the mouth of the shaft.

The evidence shows the brushing of the road was necessary in order to reach the coal and break it loose, and on principle, the wrong-doer should not be allowed compensation for the labor expended in converting the property taken into a chattel.

There was no conversion to the use of the appellant of the aggregate mass broken off by undermining, but a conversion

of the coal after it was broken up and separated from the rock, slate, sulphur and clay, after it existed as coal, as a chattel distinct and separate from the various other substances with which it was primarily imbedded. This separation was a necessary part of the operation of mining it, and of its production as an article fit for commerce and use. Until such separation it did not become the chattel called coals. It was the coals, and not a conglomerate mass of coal, slate, sulphur, clay and other substances, that were taken and converted by appellant and lost to appellee. As shown by the evidence, this slate, sulphur, stone and clay were left there. The appellant is not entitled to be re-imbursed for the expense and trouble of detaching the coals from the surrounding substances. It is the value of the article when it first exists as coals that forms the basis of the measure of damages. This severance of the several substances was part and parcel of the unlawful act of procuring the coal and was part of the labor expended in producing the chattel, and for such unlawful act and labor no charge can be made.

The rule as stated in *Robertson v. Jones*, that the plaintiff can recover "the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit;" the rule as stated in *McLean County Coal Co. v. Long*, that the plaintiff can recover as damages "the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft;" and the instruction that was sustained in *Illinois Coal Co. v. Ogle*, to the effect that the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, allowing nothing for the digging, was the measure of damages, would all have to be disregarded in order to hold as is here contended for, that the labor expended in separating the stone, slate, sulphur and earth from the coal, after the mass containing the coal first broke loose upon the removal of the underlying clay, should be deducted from the value of the coal at the mouth of the pit. We are unable to see how such severance of other substances from the coal forms any part of the conveyance, carriage or transportation of the coal from the place where dug to the mouth of the pit; and by the rule as heretofore announced, the cost of such

conveyance, and that only, can be deducted from the value at the mouth of the shaft.

The severance spoken of in the Long case and in other cases must be understood as including all the acts done and labor used in order to sever and separate the coal from the mass of other material, and render it that chattel and article of commerce known as coal, for not otherwise will the language used be consonant with the rule enunciated in that and the other cases. When detached from the clay, stone, slate and sulphur, and after all the labor has been bestowed upon it that is required to make it the coal of commerce, then, and not till then, is it to be considered as fully severed from the mass and under the control of the miner; and then, and not till then, is the conversion complete. Then the value attaches which becomes the basis of the measure of damages, and to ascertain that value, we deduct from the value at the mouth of the pit the cost of transportation from the place where dug to the mouth of the pit. This affords a simple and certain rule for the ascertainment of the damages, and is consistent with former decisions of the court, and avoids giving compensation to the trespasser and tort-feasor for his labor unlawfully expended in producing the coal.

The same rule is held in the English cases which have been heretofore cited and approved by us: *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 43 Eng. Com. L. 734; *Wild v. Holt*, 9 M. & W. 672. In these cases, as in former decisions of this court, expressions such as "the value of the coal as soon as it exists as a chattel," and the like are used; but such expressions are uniformly found in immediate connection with some such statement as that in the leading case of *Martin v. Porter*, where it is said, "which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth." Thus showing that the time fixed for the valuation of the coal, is after all labor on it has been performed and it is severed from the other layers and substances, and first exists as the chattel to which the labor bestowed was intended to reduce it. None of these cases indicate an intention to allow compensation for the labor expended in procuring the coal.

With the law thus understood, the evidence in the record is

amply sufficient to sustain the finding of the jury and the amount of damages assessed.

There was no error in refusing the instruction asked by appellant; the latter portion of it was, in view of the evidence introduced by appellant as to the general expenses of running the mine and conducting the business of the company, calculated to mislead the jury.

The judgment of the circuit court is affirmed.

ILLINOIS AND ST. LOUIS R. R. & COAL CO. v. OGLE.

(92 Illinois, 353. Supreme Court, 1879.)

Punitive damages for willful overstepping of boundaries. Where one engaged in mining and removing coal from his own land, crosses the line and proceeds to mine and remove coal from the land of another, not by mere mistake, but knowingly and willfully, in an action of trespass by the owner of the land so intruded upon, the jury will be warranted in giving punitive damages. (SCOTT, J., dissenting.)

Analysis of the reasons why courts refuse to reverse on the weight of evidence alone. In determining the weight to be given to testimony, the number of witnesses being greater upon the one side or the other, while that is a consideration always to be looked to, it is of itself by no means a controlling one. There are many other equally important tests of truth, chief of which is that of a cross-examination in the presence of the court and jury. The witness' manner, demeanor and bearing upon the stand, his replies, whether frank and open, or reluctant and evasive, his manner of expressing himself, whether moderate, dignified and respectful, on the one hand, or extravagant, impertinent and reckless, on the other, the intelligence of the witness, and the means of information in respect to the matters of which he speaks, his relation to the parties to the suit, his interest in the result—all these are of vital importance in determining the credit to be given to the witness. But these can not all be presented in a record or transmitted to another court to enable it to review the testimony by the same lights; hence the rule that this court will not reverse upon the evidence merely because it may appear to us that the preponderance may be against the verdict.

Mining coal from land of another. The rule re-affirmed that in an action for trespass for mining and taking coal from the plaintiff's land, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging.

¹ *Same v. Same*, 10 M. R. 198.

Appeal from the Circuit Court of St. Clair County; the
HON. WILLIAM H. SNYDER, Judge, presiding.

G. & G. A. KOERNER, for the appellant.

HAY & KINSPEL, and E. L. THOMAS, for the appellee.

MULKEY, J., delivered the opinion of the court.

This was an action of trespass *quare clausum fregit*, brought to the January term, 1873, of the St. Clair County Circuit Court by Joseph Ogle, against the Illinois and St. Louis Railroad and Coal Company. At the September term, 1876, of the court, there was a trial of the cause, which resulted in a judgment in favor of plaintiff for \$13,000, from which judgment the company appealed to this court.

The record shows that the parties to the suit were respectively owners of certain coal fields which lay adjoining each other, and that appellant had, for many years previous to the commencement of the suit, been engaged in mining and removing the coal from its own lands.

And it further appears that appellant, in prosecuting its mining operations, crossed the dividing line and passed over into the coal field of appellee and mined and removed therefrom a large quantity of coal. And for this invasion of appellee's rights the above action was brought, with the result already stated.

There is no controversy as to the fact of the trespass by appellant; that is conceded. But it is claimed that the damages allowed by the jury are excessive, and that the court, for that reason, should have granted a new trial.

It is also further claimed, that the rule governing the assessment of damages in cases of this character, as laid down in *Robertson v. Jones*, 71 Ill. 405, and approved and followed in *Illinois and St. Louis Railroad and Coal Co. v. Ogle*, 82 Ill. 627, after an elaborate argument and an extended review of the authorities, is not sound, and that the court below therefore erred in following it. And this court is now asked to again reconsider those cases and the authorities upon which they rest, to abrogate the rule in question which has been established by them, and to adopt another in its stead which is radically variant from it.

With respect to the question of damages, so far as it depends upon the quantity of coal taken from appellee's land, it may be remarked that the evidence is contradictory and can not be reconciled, and the estimates of the witnesses are wide apart. If the estimate made by appellee's engineer was correct, then the verdict of the jury was too small. If, on the other hand, the estimates made by the appellant's engineers are correct, then the verdict, allowing nothing for punitive damages, was entirely too large. It is doubtful, to say the least of it, when we take into consideration some important facts bearing upon the question which were testified to by other witnesses, whether either of these estimates was correct. At any rate it is evident that the jury must have come to this conclusion.

We have examined the evidence in this case with some degree of care, so as to enable us to form a proper estimate of its merits and intelligently pass upon the questions submitted for our determination.

The trespass, as already stated, is conceded, and appellant's counsel admit that under the rule adopted by this court for the assessment of damages, the plaintiff was entitled to at least \$2,312.40. It is, moreover, evident that this trespass was not the result of mere mistake, but was knowingly and willfully done; this clearly appears from the testimony of Marion and Jones, and it is not at all contradicted by any one. This being so, the jury were warranted in giving punitive damages. So far, there is no doubt about the case.

If tested by the number of witnesses, the weight of evidence with respect to the amount of coal taken is certainly with appellant. While the number of witnesses examined is a consideration always to be looked to, yet that of itself is by no means to be regarded as a controlling one. There are many other equally important tests of truth, chief of which is that of a cross-examination in the presence of the court and jury. The witness' manner, demeanor and bearing upon the stand, his replies, whether frank and open or reluctant and evasive, his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, his intelligence and means of information with respect to the matters of which he speaks, his

relation to the parties to the suit, his interest in the question between them, or in the subject-matter of the suit, are always of vital importance in determining to what, if any, credit the witness is entitled.

These considerations are essential elements in every judicial investigation through the instrumentality of witnesses. They are among the great lights and aids that enable the court and jury to arrive at the truth. But, unfortunately, in the nature of things, most of these tests of truth that are such powerful aids to the court and jury that try a cause, can not be preserved in or transcribed upon the record of it, and by reason thereof they are wholly lost to a superior court when reviewing the testimony of the witness who testified in it. For this reason it has become a well settled rule, that courts of error will not reverse a case merely because, in the opinion of such court, as appears from the record, the weight of evidence was against the verdict.

One of the great objects of a jury trial at all is to settle and determine questions between witnesses, whose statements are contradictory and irreconcilable.

In *Chicago and Rock Island Railroad Co. v. McKean*, 40 Ill. 218, this court said:

"The weight of evidence does not depend upon, nor is it made up of numbers of witnesses, but of the matter sworn to; and the position of the witnesses and their capacity to hear or see, as the case may be, are elements to be taken into consideration in weighing the testimony."

In *Bishop v. Busse*, 69 Ill. 403, it was said: "The question whether a verdict should be sustained or set aside as to the finding of the facts, does not depend on the number of witnesses testifying on each side of the disputed points. The number of witnesses may be on one side, while the decided weight of evidence may be on the other."

In *Hubbard v. Rankin*, 71 Ill. 129, it was said: "It does not follow, from the fact that two witnesses to the same transaction testify in direct opposition to each other, there is no preponderance of evidence in favor of the one holding the affirmative of the issue, as such a rule would rob the jury of their peculiar province of judging of the credibility of witnesses."

Again, in *Chicago, Burlington and Quincy Railroad Co. v. Dickson*, 63 Ill. 151, it is said: "In determining an issue of fact it is not mere numbers of witnesses that should control, but a variety of considerations enter into the determination as to where the weight of evidence lies; of these are the intelligence of the witnesses, their fairness and means of information and corroborating circumstances." And to the same effect many other cases might be cited, but we deem it unnecessary to do so.

This court has often had occasion to state the general rules and principles by which courts should be governed in refusing or granting new trials; and has also frequently had occasion to determine under what circumstances it would be error to refuse one on the ground that the verdict is not supported by the evidence. It has often been said by this court, where the verdict is *manifestly* against the evidence or weight of the evidence, a new trial should be granted: *Schoab v. Gingerick*, 13 Ill. 697; *Allen v. Smith*, 3 Scam. 97; *Scott v. Blumb*, 2 Gilm. 595.

In *Reynolds v. Lambert*, 69 Ill. 495, it is said: "It is the settled rule, to reverse where there is no evidence to sustain the verdict, or where the verdict is manifestly against the weight of the evidence."

In *Illinois Central Railroad Co. v. Chambers*, 71 Ill. 519, it is said: "A decision so clearly against the preponderance of evidence as to amount to a perversion of justice will be set aside."

In *Toledo, Wabash and Western Railway Co. v. Moore*, 77 Ill. 217, it is said: "Where there is evidence from which the jury could properly find their verdict, it will not be disturbed, though the evidence may, in the opinion of the Supreme Court, justify a different result."

In *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517, it is said: "Though the evidence may not be entirely satisfactory, yet if it tends to sustain the issue, and the circuit judge who saw the witnesses on the stand, and had facilities for determining the weight of the evidence which the Supreme Court does not possess, is satisfied with the verdict and refuses to set it aside, the Supreme Court will not disturb it."

In *Kightlinger v. Egan*, 75 Ill. 141, it is said: "Where the

testimony is conflicting, and much of it is irreconcilable upon the main question in issue, the verdict of the jury, when they are properly instructed as to the law of the case, must be regarded as settling the controverted facts." To the same effect are the cases of *Simons v. Waldron*, 70 Ill. 281, and *Connelly v. The People*, 81 Id. 379.

Again, it is said in *Chapman v. Burt*, 77 Ill. 337, "that where the evidence is contradictory, conflicting and irreconcilable, and that produced by the party in whose favor the jury find, when considered alone and independent of the opposing testimony, clearly sustains the verdict, it will not be disturbed unless it is manifest the jury have mistaken the evidence or have been governed by passion or prejudice."

Now, viewing the case before us in the light of the cases we have just adverted to, and especially the one last cited, it is manifest that it ought not to be reversed on the ground that the verdict is not supported by the evidence. There is evidently no pretense for saying, and indeed it is not claimed, that the evidence of appellee, when considered without reference to defendant's evidence, does not sustain the verdict, and there certainly is equally as little pretense for claiming that the evidence in the case was misunderstood, or that the jury were actuated by passion or prejudice, as there is for saying that the evidence of appellee, when considered without regard to appellant's evidence, does not sustain the verdict. We are clearly of opinion, therefore, that there was no error in refusing to grant a new trial.

With respect to the rule adopted by this court for assessment of damages in cases of this character, we still see no sufficient reason for changing it, even if it could be considered any longer an open question. We have read with much pleasure, and trust some profit, the brief and very able argument of the learned counsel for appellant on the question, and while we are not convinced by it, and decline to reconsider the cases decided by this court establishing the rule, or the authorities upon which they rest, yet we deem it proper to say that the more we have considered the rule and the reasons upon which it is founded, the more confident we are that it rests on sound legal principles and is suggested by a wise and just policy. The rule contended for by appellant and

adopted by some other courts would certainly work a great hardship in many cases that might be supposed, and it would, under some circumstances be a strong temptation to one who happened to have but little veneration for the laws of *meum et tuum* to trespass upon the rights of others.

It would in many cases, we apprehend, be quite easy to pass the line into another's coal mine, as was done in this case, and trespass there for months, or possibly years, without the owner knowing anything about it. The trespasser might speculate on the chances of never being detected, and at the same time console himself with the reflection that if discovered he might possibly escape through some loophole in legal proceedings, and if the worst came to worst, he would only have to pay what the coal was worth in the bank, and by pulling down the props and allowing the entries and rooms to tumble in, a scientific engineer might be able to make such estimates as would greatly reduce the actual amount of coal taken.

Again, one might have a coal field and not desire to have it mined for him just at the time it suited the convenience of his neighbor to do so. From certain temporary extrinsic causes the price might be very low, so that the owner would prefer keeping the coal till the market went up; yet perhaps its very cheapness might be a temptation to the trespasser to take it. It is believed that there are few, if any, instances with us where the owners of coal mines cross their own lines without knowing it, yet it might in some cases be difficult to prove that the taking was with a full knowledge of the owner's rights, and failing in that, all the owner could get under the rule contended for would be a half or third of a cent a bushel.

The rule which we have adopted will have a wholesome effect upon all persons operating coal mines. It will have a tendency to prevent willful trespasses on other persons' rights. To change the rule, and adopt the one proposed in its stead, would not only be unwise, on the ground of public policy, but would directly mar the beauty and in part destroy the harmony, logic and consistency that exist in that great body of common law principles and maxims that underlie and constitute a part of the jurisprudence of our State.

The rule which we have adopted is not one of our own manufacture. It is founded on legal principles and maxims as

old as the common law itself. Among them may be mentioned the following: A party shall not be permitted to take advantage of his own wrong; he can not acquire title to a chattel by a mere tortious act; that so long as a chattel can be identified, however much its value may be increased by the labor of a wrong-doer, the right of property is unchanged, and the real owner may reclaim it or recover its full value from the wrongful taker. When a portion of the realty is by a trespass severed from land, and is thereby converted into a chattel, if one other than the trespasser takes it, it is admitted he is liable for its full value in its severed condition. So in trespass *quare clausum fregit*, the defendant is always liable for the full value of any chattel he may carry away at the time of the unlawful entry. And, finally, one can not make himself the creditor of another without the latter's consent.

Now, it seems to us utterly impossible to harmonize these acknowledged principles of law with the rule contended for. Let us see. A unlawfully enters the coal mine of B, and deliberately separates from the coal in its unmined and natural state one hundred bushels of coal; the coal before separation is worth just fifty cents; when separated it is worth just five dollars. Now, when the coal is thus mined and ready for removal to market, to whom does it belong? All concede that it belongs to B, the owner of the mine. To say that A had any interest in it whatever, would be to hold that one could, in violation of the principle abovestated, acquire a right in another's chattel by his own tortious act, or in other words could take advantage of his own wrong. Suppose when the coal thus mined, C, a third party, in the absence of A, enters the mine and carries the hundred bushels of coal away without authority from B. In such case it is quite evident that A would have no right of action against C for taking the coal, and it is equally certain that B would have such a right of action, and that he could recover five dollars, the full value of the coal. This but shows that A really has no interest in the coal, notwithstanding he enhanced its value ten fold by mining it. Now if C, in the case above supposed, is bound to pay five dollars as damages for the trespass, being the full value of the coal, and A, in the event he got away with it himself, would be required to pay only fifty cents for taking the same coal, upon what principle or reason

would this difference in the measure of damages rest? Not on the form of action, for in either case we will suppose the action to be trespass *quare clausum fregit*. There is evidently no difference in the circumstances of the two cases, except that A incurred the expense of digging the coal, and C found it already dug for him. Now if A, in the assessment of damages, is required to pay only fifty cents, does he not in effect make B the owner, pay him for his labor—his tortious act? Or, in other words, he makes himself B's creditor without the latter's consent.

If the owner bring trover for coal wrongfully taken from his mines, it is conceded that the measure of damages is the value of the coal in its state or condition as a chattel without any deduction for mining; and in such case where the trespasser has sold the coal and converted it into money, the owner of the mine may waive the tort and recover the full amount of money received for coal in an action of assumpsit.

If a wrong-doer enters the premises of another and takes his horse from the stable, on a count for unlawfully breaking the close of the plaintiff, setting up by way of aggravation of damages, the unlawful taking of the horse, the owner may recover the full value of the horse, without any deductions on account of expenses incurred in removing locks from the stable or capturing the horse. These familiar principles are all in harmony with the rule we have adopted. They are not in harmony with the other.

Perceiving no error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

SCOTT, J., dissenting.—I can not concur in this decision, under any rule that can be adopted for ascertaining the measure of damages. I am of opinion the damages found are so excessive, the judgment for that reason ought to be reversed.

LIVINGSTONE V. THE RAWYARDS COAL CO.

(L. R., 5 Appeal Cases, 25. House of Lords, 1880.)

Coal worked by mistake beyond boundary—Current royalty the measure of damages—Coal inaccessible to its owner. A was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miner's cottages, and underneath was coal. When A purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu, there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A's acre and a half, and, in doing so, damaged the surface. A could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but R. and C.; and the element of willful trespass, and the element of special and exceptional need of support to the surface were absent. In a claim by A for (1) the value of the coal; (2) a sum for "way-leave," and the advantage obtained by working through instead of around the feu; and (3) for damages done to the houses on the surface: *Held*, affirming the decision of the court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value, was the royalty paid by R. and C. for the surrounding coal field; therefore, A was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface.

Point not argued below. When the question of "way-leave" was not argued before the first division of the Court of Session, it will not be entertained in the House.

Appeal from the first division of the Court of Session in Scotland.

In 1837, Mr. Gavin Black, then proprietor of the lands of Rawyards, near Airdrie, Lanarkshire, feued out a small portion of land, namely: one acre, thirty falls and twenty-one ells to the Monkland Iron and Steel Co. By the feu disposition, the grantor specially reserved to himself, his heirs and successors, the whole ironstone in the ground feued; but the deed contained no reservation of coal.

¹ *Jegon v. Vivian*, 8 M. R. 628, followed; *Allen v. Barkley*, 14 M. R. —

² *Mateer v. Brown*, 7 M. R. 156; *Meinke v. Falk*, 61 Wis. 623; 50 Am. R. 157.

In 1869, the appellant, Mr. James Livingstone, purchased the feu, and some thirty miners' cottages, which covered the surface, for £80, from the Monkland Iron and Steel Co. The appellant appears to have been under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved by the superior.

In 1871, Mr. Gavin Black died, and was succeeded by Mr. John Motherwell, the present proprietor of the lands of Rawyards. He, in the belief that all the coal on the estate had been reserved, granted, in 1872, a lease of the whole property in the coal as far as this appeal is concerned, to the respondents, the Rawyards Coal Co., at a royalty of 6d. per ton. They, just as the appellant was ignorant of his rights, were ignorant of theirs; for they believed that they were the owners of all the coal, including the coal under the appellant's feu. Accordingly, in the ordinary course of their working, and between May, 1871, and May, 1876, they wrought out and removed the coal under the appellant's acre and a half, to the amount of 5,895 tons. When this was done, and the coal disposed of, it was discovered what the real titles were, through the appellant examining his titles for the prosecution of a claim for surface damage; for the respondents in working under the acre and a half, had, by letting down the ground, caused damage to the miners' cottages. The question under these circumstances came to be, what was the measure of damages the appellant was entitled to. It was admitted that what was done, was done in perfect ignorance, and that there was no bad faith nor sinister intention on the part of the respondents. The appellant in his action claimed: (1) the value of the coal, under the deduction of proper allowances for raising the same; (2) a sum for way-leave, in respect that large quantities of coal had been carried from the adjacent coal field through the appellant's feu; (3) damages done to the miners' cottages. The respondents, admitting they had taken the appellant's coal, tendered in discharge of the action £450 10s. This offer being refused by the appellant, the lord ordinary, Lord Craighill, after a proof, found June 10, 1878, *inter alia*:

"That the coal removed from the pursuer's (appellant's) feu by the defenders (respondents) consisted of 4,300 tons, or thereby, of free (or common) coal, 1,275, or thereby, of dross,

and 320 tons, or thereby, of gas coal—in all, 5,895 tons, or thereby; and the value of these at the pithead, according to a reasonable calculation of the market value, was as follows: common coal, at 6s. per ton, £1,290; dross, at 1s. 6d. per ton, £95 12s. 6d.; and gas coal, at £1 3s. 11d. per ton, £382 13s. 4d.; thus amounting, in all, to £1,768 5s. 10d. That a fair price for working the said coal may reasonably be fixed at 4s. 3d. per ton overhead, this sum including everything except lordship and capital charges; the amount at this rate being, in the aggregate, £1,252 13s. 9d. And leaving as free profit or value in the hands of the defenders, derived from coal belonging to the pursuer, the sum of £515 12s. 1d.”

“In the second place, that the pursuer is entitled to recover the said sum of £515 12s. 1d. from the defenders; finds pursuer entitled to the expenses of process, etc.”

The lord ordinary disallowed the appellant's claim for damage to his houses by subsidence of the surface, holding that was a loss which the appellant must necessarily have incurred had he himself worked out the coal. The lord ordinary also rejected the claim by the appellant for “way-leave,” amounting to £33 6s. 8d., calculated at the rate of about 2d. per ton; and the appellant's claim for £110 9s. 8d., as the amount alleged to have been saved to the respondents by working through instead of around, the appellant's feu. And these claims were not mentioned by the appellant's counsel when the case was argued before the first division. The respondents, being of opinion that the lord ordinary had misapprehended the nature of their contention, and had greatly underrated the expense of working the coal, presented a reclaiming note against his decision. The first division, on the 20th of May, 1879, reversing the lord ordinary's interlocutor, found that the appellant was entitled to £171 7s. 6d., being the amount of lordship on the coal excavated, calculated at the rate paid by the respondents to the superior for the surrounding coal field, with, in addition, a further sum of £200 as compensation for damage done to the houses on the surface. In respect of the tender, their lordships gave the respondents their costs from the date of the said tender: Court of Sess. Cas., 4th Series, Vol. VI, p. 922; Scotch Law Rep., Vol. XVI, p. 530.

Mr. DAVEY, Q. C., and Mr. GUTHRIE SMITH, for the appel-

lant, contended that he was entitled to the value of the coal after deduction of the cost of severance and bringing it to the surface. Here the value of the coal was the free profit made by the respondents. The appellant was content with the lord ordinary's finding; but the judgment of the first division was in effect to compel the real owner of the coal to receive a royalty, giving the whole profit made to the trespassers. That finding was not consistent with the principle of *Jegon v. Vivian*, L. R. 6 Ch. 742, and the earlier cases. Where the coal is taken by fraud or negligence, the proper estimate of damage is the value of the coal when gotten, without deducting the expense of getting it: *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 M. & W. 672; and *Phillips v. Homfray*, L. R. 6 Ch. 770. But where taken by mistake, and an encroachment under title, a milder rule prevails; though in *Morgan v. Powell*, 3 Q. B. 278, the defendant was not allowed the cost of the severance of the coal. So in *Wood v. Morewood*, 3 Q. B. 440, n., a case at *Nisi Prius*, Parke, B., told the jury that if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he had, they might give the fair value of the coals as if the coal-field had been purchased from the plaintiff. The jury found that there was no fraud, and estimated the damages accordingly. That case was the precedent for the principle on which *Jegon v. Vivian*, L. R. 6 Ch. 742, was decided. See, also, *Hilton v. Woods*, L. R. 4 Eq. 432; Remarks of Malins, V. C., Law Rep. 4 Eq. 440; *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46.

The value of the coal taken was the profit admittedly gained by the respondents, but the court below thought the question of the profit it realized by the trespasser not of the least relevancy. If that judgment is right then the real owner would be wrong in claiming his own coal lying at the pit's mouth, for it would be a sufficient answer for the trespasser to tender the lordship. The fact ought to weigh that the appellant did not want the coal removed, on the contrary it was of great value to him, having a firm foundation in a county so honey-combed as Lanarkshire.

LORD BLACKBURN.—The court below decided this case on the peculiar circumstances that no one could work this coal at a profit unless he had the facilities of the respondents.

It was no answer that the appellant could not have worked the coal himself. He was entitled to have the chattel taken, restored, or if that was impossible, then the profit made out of it must be handed over to him.

The appellant was satisfied with the amount awarded by the court below for surface damage, but submitted he was also entitled to the clear profit made out of the coal.

They further maintained that a sum should be allowed the appellant for "way-leave," or for the advantage reaped by the respondents by working their tramways through, instead of around the feu.

EARL CAIRNS.—That question was not argued before the Inner House, and it is not usual to argue points in this house that have not been argued before the court below.

On the whole matter they submitted that the appellant was entitled to the profit made and to costs.

MR. E. E. KAY, Q. C., and Mr. GLOAG maintained for the respondents, putting aside the compensation for surface damage, that all the appellant was entitled to was the value of the coal *in situ*; that principle was laid down in both *Wood v. Morewood*, 3 Q. B. 440 n., and *Jegon v. Vivian*, L. R. 6 Ch. 742. The question was not what the trespasser made of the coal, but what the owner could have made of it. The appellant had no right to follow the coal; nor was the profit made on it by the respondents any test of its value *in situ*. The circumstances here were most peculiar; the appellant could not sink a shaft and work the coal himself at a profit; nor was there a single person he could sell the right of working it to except the respondents, and the appellant's own surveyor advised him to take the ordinary royalty given for the coal in the neighborhood. Therefore the value of the coal to the appellant was accurately given by the court of session, and the principle of the cases cited had been applied.

MR. GUTHRIE SMITH, in reply.

EARL CAIRNS, L. C.—My lords, there are two minor points in this appeal which I may mention in the first place for the purpose of putting them on one side. I mean the question

of an allowance for way-leave, and the question of an allowance for what is termed the advantage obtained by working through, instead of around, the feu of the appellant. Both those points were insisted upon before the lord ordinary; but when the matter came before the first division, the contest of the appellant with regard to those points, does not appear to have been renewed, and, therefore, to enter upon them now would be in substance to entertain in this house an appeal from the lord ordinary and not from the first division.

Upon the main question which has been argued the case is one of some peculiarity. The appellant is the owner of a small feu of about an acre and a half in extent near Airdrie. The surface of the ground is occupied by miners' cottages or houses, and underneath there was coal. When the appellant bought the feu some time ago he appears to have been under the impression that the minerals under this feu, as under all the ground which surrounded it, had been reserved by the superior. In point of fact that was a mistake. The superior kept in his hand the minerals under all the ground around, but under this acre and a half the coal had not been reserved in the grant of the feu now owned by the appellant. The appellant, therefore, although he did not know it, was the owner of the coal under this acre and a half of ground. The superior granted the whole property in all the surrounding land to the company, who are the respondents, and they, just as the appellant was ignorant of his rights, appear to have been ignorant of theirs. They appear to have been under the impression that they had the whole of the coal, including the coal under the acre and a half. They had the coal which surrounded the acre and a half, but they had not the coal which was underneath the acre and a half. In the process of their working they worked out the coal under the acre and a half, and when that was done it was ascertained—it is unnecessary to observe how the discovery came to be made—what the real titles were, and that this coal really belonged to the appellant, and did not belong to the respondents, who had got it and disposed of it. I ought to add that in working under the acre and a half of ground they had, by letting down or cracking the ground, caused some damage to the miners' cottages which stood upon the surface of the acre and a half.

Now, my lords, under these circumstances the question arises, what is the measure of damage to which the appellant is entitled? We may put aside some elements which might occur in some cases, but which do not occur in the present case.

There is absent here the element of any willful trespass or willful taking of coal, which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done. We may put aside another element which might have occurred. It might have been the case that the support of the coal under this acre and a half of ground had been of some peculiar advantage or benefit to the appellant, for which no money would compensate him; either by some use made of the surface, or by some specific use intended to be made of the surface, there might have been a peculiar need for the support of the minerals underneath, which might either have made it impossible to estimate the damage, or might have made the estimate of the damage exceptionally high. Neither of these elements occurring—neither the element of what I will call willful trespass, nor the element of special and exceptional need of support—the case is one in which your lordships have simply to ascertain what is the ordinary measure of damage for the coal taken, or what, in other words, is the value of the coal that was taken.

Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country, or in Scotland, that you have a right to follow the article which is taken away, the coal which is severed from the inheritance, into whatever place it may be carried or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken?

I own that it appears to me that the court of session have adopted a principle which is not unsatisfactory for the purpose of ascertaining that value. They have said the value to this appellant is not the value which he could have derived from

himself working the coal and taking it into the market, because he could not have worked it; the area is so small that it would have been impossible for himself to have worked and used the coal, and earned a profit, or put an additional value upon the coal by so working it; he must have gone to some person, or waited till some person came to him who had the power of working the coal from adjacent working; therefore, say they, the value is that which he could have obtained from somebody else who would have come and taken the coal as it stood *in situ*, and who would have worked it and turned it to account. Then they go to the witnesses of the appellant, and they must take Mr. Rankine, his principal witness; and I observe that another witness of the same stamp and character as Mr. Rankine immediately follows, who wishes his testimony to be taken as repeating Mr. Rankine's *in omnibus*; therefore those two witnesses must be taken to say this. Mr. Rankine is asked this question: "Suppose you had been asked by pursuer whether it would be advisable for him to sell the whole of these minerals to defenders for £100, the defenders paying compensation for the damage to the houses, would you have advised him to take it?" and his reply is: "The advice I have invariably given—I have done it in two instances within the last two years—is, 'Don't let your coal for a less lordship than that obtained by the adjoining proprietor;' and in that case I should have said to the pursuer, 'Do not take less than £171 7s. 6d. for the coal *plus* the damage to the houses.'" He says that the advice which he would have given to his client would have been not to sell for less than (which implies, of course, to sell for,) £171 7s. 6d., *plus* the damage done to the surface, that is to say, that if there had come to him some person who, from possession of the adjoining property, had been able to work this coal, and had asked the appellant to sell the coal to him, the appellant would have been advised to reply: "I will sell you the coal for a royalty, that is to say, a sum per ton which will produce to me £171 7s. 6d.; but in addition, you must undertake to pay me whatever damage is done to my houses which are upon the surface of the land;" and for the purpose of the present argument the amount of damage as ascertained and not objected to is a sum of £200.

Upon that evidence the court of session say: "We are of opinion that the value to this appellant of this coal was the

money that would have been produced if he had sold the coal, and the money that he would have got if he had sold the coal would have been £171 7s. 6d.; but that would have been accompanied and guarded by a further payment which would have indemnified him for the damage done to the houses upon the surface in getting the coal, and that further sum he must have in addition to the £171 7s. 6d."

My lords, I own that under the very peculiar circumstances of this case, there being only the element to consider to which I have referred, namely, the element of value to the appellant, I think he has received in the judgment of the court of session that which is the proper value, and I see no reason for differing from the judgment of the learned judges. I therefore advise your lordships, and move your lordships, that the appeal be dismissed with costs.

LORD HATHERLY.—My lords, after carefully considering the case, I have come to the same conclusion, though at one time I was under the impression that there was more in the question of the sale by royalty being as it were enforced than I at present think.

The case is certainly a very peculiar case, and without withdrawing from any of the principles which I found in the case of *Jegon v. Vivian*, Law Rep. 6 Ch. 742, to be established by the prior authorities, I think this case may be disposed of, and will be disposed of, by your lordships in entire consistency with those principles. There is no doubt that if a man furtively and in bad faith robs his neighbor of property, and, because it is underground, is probably not for some time detected, the court of equity in this country will struggle, or I would rather say will assert its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been, the one working and the other permitting the working through a mistake.

The courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud. In the present case, it is clear

on both sides that each party was ignorant of the rights of the pursuer, and consequently the matter is not to be treated as a case of forced sale, but as a case of sale which has taken place by inadvertence; and what we, as a court of justice, have to do is to see that under these untoward circumstances that which never ought to have been done at all, but which has been done either through want of watchfulness or through want of knowledge, as the case may be, and which has occasioned in the doing an injury to either of the parties, is remedied and set right, so far as it can be, upon equitable principles. Those principles are no doubt settled by the authorities, many of which have been cited in the course of this argument; those principles are that the owner shall be re-possessed, as far as possible, of that which was his property; and that, in respect of that which has been destroyed, or removed, or sold, or disposed of, and which can not therefore be restored in specie, there shall be such compensation made to him as will, in fairness between both parties, give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has, by misfortune and inadvertence on both sides, and through no fault, been done. Perhaps the law may have even gone a step further than in some cases might be necessary. Each case must stand upon its own particular foundation in that respect; but, regard being had to the rule *vigilantibus non dormientibus*, it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment, and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to take every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which can not be restored to him in specie.

In this case we are singularly free from any difficulty upon the point, and the parties seem to have carried on the litiga-

tion on a principle which does them credit, and on which one wishes to see all litigation carried on. They say: "The misfortune has taken place. We neither of us knew anything about this at the time, and now that it has taken place let us see what can best be done to remedy the misfortune which has so occurred." We find the position of the case to be a very singular one indeed, and one which is not likely to recur in many instances, though it may in some instances. It is this: A small piece of ground, an acre and a half in extent, being the property of the pursuer, is surrounded by the property of the defenders; and the defenders thought (and the pursuer thought so too,) that it was included in their property, instead of being a separate portion surrounded by their property. That being the case, one thing was perfectly clear, and I shall make it clearer presently by reading the pursuer's own evidence, that nothing could be made by the pursuer of this acre and a half of ground by working it himself. He would not sink a shaft or put up a steam engine, or use any of the ordinary modes of working a mine, in respect of this acre and a half of ground; and indeed, that is what he tells us himself, because, in words which were read by the learned counsel who last addressed your lordships, the pursuer says, in his own appendix of proofs, on re-cross-examination: "If the defenders had not taken away this coal, I might have arranged with them to take it away through their pit, but I don't think it would have been profitable to have done so; I would rather have it standing; I don't think there was any way in which I could have turned this coal into money;" and then he goes to another subject. Several houses were built upon this property; they were apparently small cottages, not of a very heavy description in themselves, and he complains that if he were minded (though it does not appear that he ever was so minded,) to build a manufactory or some large building upon the ground, he would not, in consequence of its being so worked by the defenders, be in a position to find a foundation for his building. Whether he refers to that when he says that he would rather have it remain as it was, I do not know, because in his evidence he touches upon it very lightly; but he says that he could not work it himself, and that there were no people to whom he could dispose of it but the defenders themselves.

My lords, that being so, I do not know what better mode there could have been for ascertaining what the value of the property in this case was, than by doing what the pursuer himself says he should have been obliged to do in order to turn it into money, and what his own agent, Mr. Rankine, said he always advised him to do. Mr. Rankine, his agent, said: "It is not workable by yourself in consequence of its small size and of its so being surrounded by other property—so make the best you can of it, only do not let yourself be driven into a corner. You may perhaps find yourself put to a disadvantage by having only one purchaser; nevertheless, do not part with it for a less royalty than you could get from anybody else, and whatever others are willing to pay I should stand upon, and if you can not get that, I should insist upon retaining the property in its present shape." That being so, the pursuer says in his evidence: "I don't think that there was any way in which I could have turned this coal into money. It was about the middle of 1875, when the houses began to crack, that I first knew the defenders were in the course of working out coal under my feu. I spoke about the matter to Mr. John Motherwell. I did not ask that the working should be stopped. I suggested that it should have been wrought stoop-and-room for the sake of protecting the property as much as possible. I made no objection to their going on with the working out of the coal below the feu; I was quite content that they should go on with the working." That was before he knew that the coal under the property was his own. Up to that time he could not of course know very well what rights he had to stop this working; but when you put the two sentences together—one, that he could not have disposed of the property to any other persons, and the other, that he did not think of taking any steps to stop the working, I think he can not complain that he has got from the gentlemen the very same terms that he would have got from the adjoining proprietors with whom he has to deal.

The learned judges in the court below seem to have proceeded upon that footing. The lord president says "In addition to the consideration above mentioned, it must be kept in view that the coal in question was surrounded on all sides by the coal field of the superior,

which is leased to the defenders. As the pursuer's estate is only one and a half acres in extent it is evident that the coal under it could not have been worked to profit by himself working independently. Nobody but the superior or his lessees could have worked the coal to any profit. Now, let us consider the position of the pursuer before the defenders commenced to work his coal. He was then in possession of a certain piece of coal, and his object must be assumed to be to make the most of it. It can not be assumed that he could contemplate keeping the coal as a support for his cottages, instead of working it out. It was situated in a part of the country where every available bit of mineral is in use to be wrought. Now, at that point of time, had the parties come together the coal would in all probability have been disposed of to the defenders on terms mutually advantageous. The pursuer says indeed, that he could have made exceptionally good terms for himself, as his coal stood in the way of the defender's working. But I think when Mr. Smith spoke of the defender's necessity being the pursuer's opportunity he went too far. I do not think that the purchase of the pursuer's coal was a matter of necessity to the defenders, but only a matter of convenience. There was nothing to prevent their working round his coal. But, on the other hand, if the pursuer wished to make the most of his coal he must have taken what the defenders would give him, or let it stand." In that state of things, and finding that the coal has so been worked out, the learned judges say: "We find that the best mode, in this particular case of ascertaining the proper measure of damages, is to give the pursuer what the books and cases tell us we are to give him, that is to say, as far as possible, the value of his coal, and that we will do by saying he shall be compensated to the same extent as others have been compensated in adjoining properties; besides that he shall be compensated, and he has been by the decree compensated, for any damage done to the buildings upon the surface." That has been estimated at £200, and acquiesced in by both parties. He is paid for the royalty £171; he is paid for the value of the coal which has been disposed of; and therefore it seems to me that all he can possibly ask for has been given.

The question of way-leave does not seem to have been

argued in the court below, but if it had been argued I should have been prepared to say that I acquiesce in this particular case, and under all the circumstances of this case—which I think are extremely different, in many remarkable particulars, from those of *Jegon v. Vivian*, L. R. 6 Ch. 742—in the interlocutor pronounced by the lord ordinary. But, looking at the form in which this case has been brought before us, no question of this kind arises. Nothing could have been properly estimated and given as the value of the right exercised by the defenders, of taking their wagons and coals from time to time through the ground of the pursuer, they assuming it to be their own ground. What profit can be said to have been derived from that? The profit is this: That you save distance; you save other payments which you might have had to make, and therefore, inasmuch as the pursuer can not make out that the slightest damage has accrued to him in respect of that user, what you have to pay him is only the value of this coal *plus* the damages to the surface. It appears to me to be quite consistent, and that the pursuer rightly has not pressed that case of the way-leave, because he would have done so with very little effect.

Therefore, under all these circumstances, I am prepared to acquiesce entirely in the judgment of the court below.

LORD BLACKBURN.—I also think that the judgment of the court below should be affirmed, and consequently the appeal should be dismissed with costs.

The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should, as nearly as possible, get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would

say that everything would be taken into view that would go most against the willful wrong-doer—many things which you would properly allow in favor of an innocent, mistaken trespasser, would be disallowed as against a willful and intentional trespasser, on the ground that he must not qualify his own wrong and various things of that sort. But in such a case as the present, where it is agreed that the defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the pursuer, then comes the question, how are we to get at the sum of money which will compensate them?

Now, my lords, there was a technical rule in the English courts in these matters. When something that was part of the realty—we are talking of coal in this particular case—is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrong-doer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago, and when I say a long while I mean twenty-five years ago, Mr. Baron Parke put his qualification on it, as far as I am aware, for the first time. He said, if, however, the wrong-doer has taken it perfectly innocently and ignorantly, without any negligence, and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a

fair price if the wrong-doer had bought it whilst it was yet a portion of the land, as you would buy a coal field: *Wood v. Morewood*, 3 Q. B. 440, n. That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon v. Vivian*, Law Rep. 6 Ch. 742, which has been so much mentioned; it was followed in the court of chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoing, the point that is to be made out for the damages is, as was expressed in the minutes of the decree, "The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district." That I understand to mean, as if the mines had been purchased while the minerals were yet part of the soil. That, I apprehend, is what is to be done here, and that is what both the lord ordinary and the first division of the court of session have endeavored to do. They have come to different pecuniary results, and the question really comes to be, which is correct.

Upon that the lord ordinary, as I understand, has gone upon this position. He said: "I have taken evidence, and the result of that is that it is agreed on all hands that this coal, when it was brought to the surface, actually did sell for £1,768 5s. 10d. I look at the evidence, and I take the evidence to be that the actual amount expended by the defendants (there is contradictory evidence on such points, as might have been expected, and it is not all very clear,) was 4s. 3d. per ton," and, deducting that from the £1,768 5s. 10d., he makes it £515 12s. 1d., which is what he says is the sum that the pursuer ought to recover, taking off all the expenses that the defenders have incurred. But then, as it would necessarily follow, when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over. You must not take that sum as being a matter which you are to be paid for, and also take the coals as if they had been got out without damage. On the lord ordinary's figures, as it seems to me, the £515 12s. 1d. would be right, and if there was no other way of getting at the figures, if you could not get evidence of the value of the coal

in situ in a more correct way, I suppose it would be right to take them in that way. It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

But then the lord ordinary himself observes that, taking that way of getting it, and giving the pursuer £515 12s. 1d., "the truth of the matter is that the removal of the pursuer's coal by the defenders, in place of being a misfortune, has been to the pursuer a singular stroke of luck. The size of his fen is less than an acre and a half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the pursuer might have endeavored to make with the defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short of what has been awarded by the lord ordinary. The lordship, in the circumstances, could not be expected to be higher than that paid by the defenders for the adjoining portion of the seam; and this, upon the quantity taken out, even increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500." Now, when you find that the lord ordinary himself, who is professing to ascertain what is the money value of the damage that the pursuer has received, says: "I have got at it in this particular way, but that money value is very considerably above the damage that you have received; it has been a singular stroke of good luck to you that you should get it." It occurs to one at once, *prima facie*, that there must have been something wrong in the way in which that money value was got at, and I think that there was an error in it, and that error was that the lord ordinary thought he was bound by decisions, which I do not think he was, to take that mode, and that mode only, of getting at the value of the coal *in situ*—namely, the price which the coal fetched when it was sold, deducting from that the cost of hewing and drawing and so forth, and so to ignore totally the fact this was an isolated small patch of land from which the pursuer, as he himself admits, could not

possibly have got coal by any practical means whatever, except by bargaining with the defenders. I think there the lord ordinary was under a mistake. The lord president points out very clearly to my mind that the pursuer could not have made any use of his coal at all as long as he did not let it to the defenders, who were the only people who could take it. He can not do more than ask for his damage to the surface. That he is of course entitled to, as the defenders have taken his coal without his leave and against his will. If they had taken it with full knowledge *scilicet* there would have been very much more damage given; but they have innocently and ignorantly taken away his coal. "And then," says the lord ordinary, "we must see what was the value of the coal *in situ*, as it stood there, to the pursuer at the time when the defenders, by mistake, took it away, and for that we must give compensation." Then he takes the evidence of Mr. Rankine, and says: "That is the best evidence that we could have of the value of the coal." And that sum is what the court of session has given.

My lords, I only wish to say one word to guard against any misapprehension on a point which I at first a little misapprehended. I do not think this decision of the court of sessions is that the royalty is the measure of damages. It is only that it is evidence of the value which is the measure of damages. As to the other matters, about the way-leave and so forth, I quite agree with what has been said by my noble and learned friend on the wool-sack, that inasmuch as in the court of session on appeal from the lord ordinary those questions were not raised again, they are not before this house at all. If they were, I should be inclined to agree with what has been said by my noble and learned friend opposite, and the pursuer would gain very little benefit from that contention.

Interlocutor appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, Feb. 13, 1880.

MISSOURI FURNACE CO. V. COCHRAN, Adm'x, etc.

(8 Federal Reporter, 463. U. S. Circuit Court, Western District of Pennsylvania, 1881.)

Breach of contract to furnish daily supply of coke. C. contracted to deliver to the Furnace Company 36,621 tons of Connellsville coke at \$1.20 per ton, in equal daily quantities, on each working day during 1880. After having delivered 3,765 tons C. notified the company that he would deliver no more coke, offering no valid excuse. The company thereupon contracted with H. for 29,587 tons of coke on terms similar to those of the contract broken by C., except that the price per ton was fixed at \$4, that being the then market price, in February. In May, the price of coke fell to \$1.30 per ton. The company brought suit for damages soon after the breach. *Held*, that they could not recover the difference between the contract price with C., and that with H., but that the proper measure of damages was the sum of the difference between the contract price and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract.

Motion by plaintiff for new trial.

HENRY HITCHCOCK, GEORGE SHIRAS and S. SCHUYER, JR., for plaintiff.

C. E. BOYLE and D. T. WATSON, for defendant.

ACHESON, D. J.

This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of 36,621 tons of standard Connellsville coke, at the price of \$1.20 per ton, subject to an advance in case of a rise in wages, deliverable on cars at his works, at the rate of nine cars of thirteen tons each per day on each working day during the year 1880. After 3,765 tons were delivered, Cochran, on February 13, 1880, notified the plaintiff that he had rescinded the contract, and thereafter delivered no coke. After Cochran's refusal further to deliver coke, the plaintiff made a sub-

¹ *Merrimack Co. v. Quintard*, 2 M. R. 346.

stantially similar contract with one Hutchinson for the delivery during the balance of the year of 29,587 tons of Connellsville coke at four dollars per ton, which was the market rate for such a forward contract, and rather below the market price for present deliveries on February 27, 1880, the date of the Hutchinson contract. The plaintiff claimed to recover the difference between the price stipulated in the contract sued on, and the price which the plaintiff agreed to pay Hutchinson under the contract of February 27, 1880. But the court refused to adopt this standard of damages, and instructed the jury that the plaintiff was "entitled to recover upon the coke which John M. Cochran contracted to deliver and refused to deliver to the plaintiff, the sum of the difference between the contract price—that is, the price Cochran was to receive—and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract." Under this instruction there was a verdict for the plaintiff for \$22,171.49. As the plaintiff had in its hands \$1,521.10 coming to the defendant for coke delivered, the damages as found by the jury amounted to the sum of \$23,692.50.

The plaintiff moved the court for a new trial, and, in support of the motion, an earnest and certainly very able argument has been made by plaintiff's counsel. But we are not convinced that the instruction complained of was erroneous.

Undoubtedly it is well settled, as a general rule, that when contracts for the sale of chattels are broken by the vendor failing to deliver, the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered: *Sedgwick on the Measure of Damages*, 7th Ed., 552. In *Shepherd v. Hampton*, 3 Wheat. 200, this rule was distinctly sanctioned. Chief Justice Marshall there says: "The unanimous opinion of the court is that the price of the article at the time it was to be delivered is the measure of damages." *Id.* 204. Nor does the case of *Hopkins v. Lee*, 6 Wheat. 118, promulgate a different doctrine; for clearly "the time of the breach" there spoken of is the time when delivery should have been made under the contract.

It is said in Sedgwick on the Measure of Damages, 7th Ed., 558, note b: "Where delivery is required to be made by installments, the measure of damages will be estimated by the value at the time each delivery should have been made." In accordance with this principle the damages were assessed in *Brown v. Muller*, L. R., 7 Ex. 319, and *Roper v. Johnson*, L. R. 8 C. P. 167, which were suits by vendee against vendor for damages for failure to deliver iron, in the one case, and coal, in the other, deliverable in monthly installments. In one of these cases suit was brought after the contract period had expired; in the other case before its expiration; but in both cases, the vendor had given notice to the plaintiff that he did not intend to fulfil his contract. To the argument, there urged on behalf of the vendor, that upon receiving such notice it is the duty of the vendee to go into the market and provide himself with a new forward contract, Kelly, C. B., in *Brown v. Muller* said:

"He is not bound to enter into such a contract, which might be to his advantage or detriment, according as the market might fall or rise. If it fell, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

Where the breach is on the part of the vendee, it seems to be settled law that he can not have the damages assessed as of the date of his notice that he will not accept the goods: Sedgwick on Measure of Damages, 601. The date at which the contract is considered to have been broken by the buyer is that at which the goods were to have been delivered, not that at which he may give notice that he intends to break the contract: Benjamin on Sales, § 759. And indeed, it is a most rational doctrine that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract might choose his own time to discharge himself from further liability.

The law as to the effect of such notice is clearly and most satisfactorily stated by Cockburn, C. J., in *Frost v. Knight*, L. R., 7 Ex. 112.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him to decline to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

We do not think the force of the English cases referred to has been at all weakened by that of the *Dunkirk Colliery v. Lever*, 41 Law Times (N. S.) 632, so much relied on by the plaintiff's counsel, nor are the facts of that case similar to those of the case in hand. There the controlling fact was, that at the time the vendee definitely refused to accept there was no regular market for cannel coal, and the vendors resold as soon as they found a purchaser according to the ordinary course of their business, and without unreasonable delay; therefore, it was held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained.

Our attention has been called to *Masterton v. Brooklyn*, 7 Hill, 61. Undoubtedly this is a leading case in this branch of the law, and especially upon the subject of the profits allowable as damages, and the principles upon which they are to be ascertained. The suit, however, was upon a contract to procure, manufacture and deliver marble for a building, and involved an investigation into the constituent elements of the cost to which the contractor might have been subjected had the contract been carried out, such as the price of rough

material in the quarry, expenses of dressing, etc. Upon the question as to the time at which the cost of labor and materials was to be estimated the court was divided; and I do not find that the views of the majority upon this precise point have been followed. The case, however, lacked the element of market value, (Id. 70,) and as Judge Nelson cited with approbation *Boorman v. Nash*, 9 B. & C. 145, and *Leigh v. Paterson*, 8 Taunt. 540, it can not be supposed that the court intended, in a case of a marketable article having a market value, to sanction the principle contended for here.

I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach what is the true measure of damages? Says Kelly, C. B., in *Brown v. Muller*, "The proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed." That result—which is compensation—is secured, it seems to me, by the rule given to the jury heré, un'less the case is exceptional. The vendee's real loss, whether delivery is to be made at one time or in installments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and can not, for that or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains: *McHose v. Fulmer*, 73 Pa. St. 367; *Richardson v. Chynoweth*, 26 Wis. 656; Sedgwick on Dam. 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart.

In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces or otherwise. Furthermore the contract with Hudson, February 27, 1880, was made at a time when the coke market was excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of four

dollars per ton, but this rate was of brief duration. The market declined about May 1, 1880, and by the middle of that month the price had fallen to one dollar and thirty cents per ton. The good faith of the plaintiff in entering into the new contract can not be questioned, but it proved a most unfortunate venture. By the last of May the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchinson to the extent of 20,000 tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and can not fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract.

The motion for a new trial is denied.

STRATTON V. LYONS.

(53 Vermont, 641. Supreme Court, 1881.)

Recovery after severance, by surface owner against trespasser, for clay severed—Measure of damages. S., in 1855, conveyed a clay bed on his farm to five persons, who shortly afterward conveyed the same to the U. S. Pottery Co., which company occupied the clay bed until 1857 and abandoned it. In 1874 defendant took possession of the clay bed under color of a deed from one H., and worked it. Plaintiffs had no possession of the clay beds other than the general possession of the surface of the close. *Held*, that plaintiff on such possession could maintain trespass; that defendant could not resist a judgment upon the fact of a title outstanding; but that plaintiff could not recover the value of the clay which belonged to another, but only “the amount of injury directly resulting to the plaintiff from the act complained of.”

¹ Land includes not only the ground or soil, but everything attached to it, above or below.

² Possession of surface owner extended to mines, after severance. Where plaintiff's ancestor had severed and sold a clay bank which was afterward abandoned by his grantee: *Held*, that “the possession of the surface which the plaintiffs then had would thereafter extend to the clay pit.”

¹ *Pretty v. Solly*, 8 M. R. 301.

² No authorities showing the relation of the surface and mine owners after severance of the two estates are considered in the opinion, although

Action, trespass on the freehold. Trial by jury, December term, 1878, DUNTON, J., presiding. The facts sufficiently appear in the opinion of the court.

C. N. DAVENPORT and J. R. BATCHELDER, for plaintiff.

GARDNER & HARMON, with whom was SIBLEY, for defendant.

The opinion of the court was delivered by BOYCE, J.

On the 16th day of June, 1855, Elhanan W. Stratton, by his deed of quitclaim of that date, conveyed to J. H. Archer and four others who constituted the United States Pottery Company, their heirs and assigns forever, all his right, title, interest or demand in or unto the following described premises and rights, viz.: "The clay bed so called, situated on my land easterly of the house where I live, near the brook, with the right of digging and carrying away the same from any part of the farm owned by me, and with a right of way to and from the clay in prosecuting the business of digging and moving said clay." The plaintiffs proved themselves in possession of the land described in the declaration, and entitled to a life estate in all the lands formerly owned by their father, Elhanan W. Stratton, under his will, executed January 26, 1863. Archer, and the other grantees named in the deed from Stratton to them, dated June 16, 1855, conveyed all the interest they acquired by said deed to the United States Pottery Company; and said company occupied and possessed said clay bed, and dug and removed clay from the same until 1857. In January, 1874, the defendant took possession of said clay bed, under color of a deed from George W. Harman, purporting to convey it by the same description given in the deed from

the court with clear right prevented plaintiff recovering for the clay taken. The judgment was reversed for manifest error in refusing to allow defendant to connect himself with the legal title, which had been granted to the pottery company. Even if the court were right in allowing the surface possession of the original owners *after severance of the mineral title* to justify a recovery against trespassers taking the clay, yet the merest license or sufferance of the party owning the clay would show the plaintiff in this case to be himself an intruder. See *Keyse v. Powell*, 2 El. & Bl. 182.

E. W. Stratton. He occupied the clay bed; built a timber arch into the ground to enable him to reach the clay; stored his tools there; and dug and removed clay therefrom; and had exclusive possession of the same, until the bringing of this action; and this suit is brought to recover for those acts.

Neither Elhanan W. Stratton nor the plaintiffs ever had any possession of the clay bed other than the general possession of the surface of the close in which it was situate after 1855. But the plaintiffs had such general possession ever after the probate of the will of E. W. Stratton, March 16, 1862. It is claimed that the plaintiffs have not any title that will entitle them to maintain the action. Their general possession of the surface of the close in which the clay pit was situate would include the surface of the clay pit; and whoever is in possession of the surface of the soil is in law deemed to be in possession of all that lies underneath the surface. Land includes not only the ground or soil, but everything attached to it, above or below. The legal maxim is *cujus est solum, ejus est usque ad cælum*. The action is called a possessory action, and it is well settled that any one in possession may maintain it against any one who can not show a right superior to the right of the party in possession, or can justify under the party having such right. *Crowder v. Oldfield*, 6 Mod. 21; *Whittington v. Boxall*, 5 Q.B. 139; *Chambers v. Donaldson*, 11 East, 65; 2 Hilliard on Real Property, 266. So that we think the plaintiffs may maintain the action on their possessory title. Neither do we think that the defendant can defend by simply showing the actual title to the *locus in quo* in another. The possession which the United States Pottery Company once had was abandoned in 1857, and the possession of the surface which the plaintiffs then had would thereafter extend to the clay pit; and being so in possession, they could defend that possession as against all persons who could not justify under the title of the pottery company. The defendant offered, as evidence tending to show that he had acquired the title of the pottery company, their articles of association and certain annual reports of said company, judgment files in a suit by George W. Harman against said company, original records of said company from June 10, 1862, to January 8, 1874, and a deed from said company to said Harman dated Jan. 9, 1874.

Upon a general objection to the admissibility of said papers as evidence, the court, *pro forma*, excluded them. We do not think that the court was justified in holding as matter of law that the papers offered in evidence had no tendency to show title in the defendant. It was not necessary to the admissibility of the evidence offered, that, standing alone, it should show title in the defendant; but if that evidence, together with such other evidence as the defendant might introduce, would show such title, it was admissible. The evidence had a tendency to show title in the defendant, and should have been admitted.

It appears that the plaintiffs were permitted, after the judgment files in the case of *Harman v. The Pottery Company* had been excluded, to attack that judgment by the evidence of S. B. McEowen, which tended to show that there was no legal service of the writ upon which the judgment was rendered. It would be permissible for the plaintiffs to attack and impeach the title under which the defendant attempted to justify; but evidence to impeach the judgment in favor of Harman was improperly admitted because there was no such judgment in evidence.

We think the court erred upon the rule of damages. Elhanan W. Stratton conveyed all his interest in the clay which the defendant took from the pit and for which the plaintiffs were allowed to recover, by his deed to Archer and others; hence he had no interest left in the clay which could pass by his will to the plaintiffs, and a recovery for the value of the clay by the plaintiffs would not be a bar to a claim that might be made by those claiming under the deed from E. W. Stratton.

While, as we have seen, the plaintiffs might maintain the action upon their possessory title, they had no such interest in the clay as would entitle them to recover for its value. The measure of damages in this kind of action is the amount of injury directly resulting to the plaintiff from the acts complained of: Sedgwick on Damages, 139.

The judgment is reversed and cause remanded.

1. Measure of damages in action for breaking barriers: *Bannon v. Mitchell*, 2 M. R. 108.

2. Measure of damages for taking coal: *Austin v. Huntsville Co.*, 9 M. R. 115; *Llynvi Co. v. Brogden*, L. R., 11 Eq. 188; *Wild v. Holt*, 9 M. &

W. 672; *Post* POSSESSION; *Blaen Avon Co. v. McCulloh*, 59 Md. 403; 43 Am. R. 560; see note to *Tilden v. Johnson*, 36 Am. R. 770.

3. Damages, whether liquidated or a penalty: *Bell v. Truit*, 8 M. R. 649.

4. Measure of damages for failure to deliver copper ore: *Humphreysville Co. v. Vermont Co.*, 33 Vt. 92.

5. Rule for estimating damages for fraud in the sale of land: *James v. Elliott*, 44 Ga. 237; *Page v. Parker*, 6 M. R. 544.

6. Proviso in conveyance that grantee should not dig coal for sale: *Held*, not to affect the measure of damages for coal taken: *Ashton v. Stock*, L. R. 6 Ch. Div. 719.

7. When owner of minerals is entitled to damages for ores under right of way taken by railroad company: *Fletcher v. Great W. R. R. Co.*, 4 H. & N. 242; *Post* RAILROADS.

8. Damages occasioned by diversion of stream by adjoining mine owner: *Fletcher v. Smith*, 5 M. R. 78.

9. Compensation for coals wrongfully severed: *Phillips v. Homfray*, L. R., 6 Ch. App. 770; *Post* VENDOR AND PURCHASER.

10. Compensation for disturbance of surface: *Gill v. Dickinson*, 49 L. J. Q. B. 262.

11. Working mine by instroke under lease not a ground for damages: nor yet a failure to work continuously: *Jegon v. Vivian*, 8 M. R. 628.

12. *Quantum* of damages for injury to colliery by obstructing highway a question for a jury: *Iveson v. Moor*, 12 Modern, 262; 1 Ld. Rayd. 495.

13. In trespass for cutting into the plaintiff's close and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition: *Jones v. Gooday*, 8 M. & W. 146.

14. Rule for estimating compensation for injury done to surface by the exercise of power to mine, reserved to grantor: *Mordue v. Durham*, L. R., 8 C. P. 336.

15. Measure of damages for destroying plaintiff's way from his ore bed: *In re Poughkeepsie Co.*, 63 Barb. 151; *Post* RAILROADS.

16. In an action of damages for injury to real estate by blasting, the mental anxiety of the plaintiff for the personal safety of himself and family is not a proper element of damages: *Wyman v. Leavitt*, 71 Me. 227; see note to S. C., 36 A. R. 306; and see *Wright v. Compton*, 2 M. R. 189.

17. For a technical breach of trust in the sale of mining stocks by a bailee, presenting a case of *damnum absque injuria*, see *Atkins v. Gamble*, 42 Cal. 86; *Post* STOCK.

18. Damages for the sale of an oil well at less than its value, caused by the failure of defendant to deliver a telegram, held not recoverable: *Baldwin v. U. S. Telegraph Co.*, 3 M. R. 70.

19. Measure of damages for conversion in the action of trover distinguished from that of the statutory action of claim and delivery: *Bericich v. Marye*, 9 Nev. 312; *Post* STOCK.

20. In assumpsit for waste water supplied to defendant from plaintiff's mine the measure of damages is the value of the water to defendant: *Chicago & R. I. R. R. v. Northern Ill. Coal Co.*, 36 Ill. 60; *Post* WATER.

21. Contract specifying a certain sum as damages for breach of agreement distinguished from penalty: *Cotheal v. Talmage*, 9 N. Y. 551; *Post PROSPECTING CONTRACT*.
22. Rendering bill for services as broker construed as limiting the broker's compensation to the sum named in the bill: *Daniels v. Wilber*, 2 M. R. 283.
23. The measure of damages for coal carried away by mistake is the value of the coal and the injury to the land caused by mining: *Forsyth v. Wells*, 41 Pa. St. 291; *Post TROVER*.
24. The measure of damages for injury to the surface of land adjoining that upon which the defendant has dug a pit, is the actual loss of and injury to the soil: *Gilmore v. Driscoll*, 122 Mass. 199; *Post SURFACE SUPPORT*.
25. The measure of damages for wrongfully removing gold-bearing earth, is the value of the gold less the cost of digging the earth and separating the gold: *Goller v. Fett*, 30 Cal. 482; *Post PARTIES*.
26. In a contract which provided that the measure of damages for a failure to deliver coal in monthly installments, should be so much per ton, or the option of the vendee the installments should be delivered in succeeding months: *Held*, that the vendee having elected to take under the second provision would be entitled to the actual damages for a complete failure to deliver any more coal: *Grand Tower Co. v. Phillips*, 23 Wall. 471.
27. A trustee for the sale of oil who has acted in good faith, is liable only to account for the actual sales: *Greenwood's App.*, 92 Pa. St. 181; *Post TRUST*.
28. The measure of damages for land taken by eminent domain is its market value, and the fact that there is a mine under the surface may be considered, though such mine has never been used: *Haslam v. Galena R. Co.*, 64 Ill. 352.
29. For a case in which it was held no error for the court to instruct the jury that it would be a hard case to subject the defendant to heavy damages, see *Grove v. Donaldson*, 2 M. R. 507.
30. In trespass for mesne profits, the plaintiff may recover more than the rent or yearly value of the land; he may charge all actual injury to the premises: *Huston v. Wickersham*, 2 W. & S. 308.
31. The rent actually received does not fix the rental value: *Kille v. Ege*, 82 Pa. St. 112; *Post RENTS*.
32. In an action for the interruption of plaintiff's business and the loss of time by his workmen, who quit work because of the negligent acts of defendant in blasting rock, the measure of damages is the value of the work which defendant's negligence prevented being done: *Hunter v. Farren*, 127 Mass. 481.
33. A clause in a contract providing for the payment of a certain sum for the privilege of taking clay from land whether actually taken or not, construed to be a provision for liquidated damages: *Johnston v. Cowan*, 9 M. R. 299.
34. Amount to be recovered for failure to comply with contract for the delivery of ore: *Kennedy v. Schuartz*, 2 M. R. 679.

35. In trover for oil raised in working a salt well under lease, the lessee having sold the oil without right, the measure of damages was held to be the value of the oil at the instant of separation: *Kier v. Peterson*, 8 M. R. —.

36. In a contract for the sale of oil, the measure of damages for a failure to deliver, is for the jury to determine by its market value: *Kountz v. Kirkpatrick*, 72 Pa. St. 376.

27. For the measure of damages in an action for causing the flooding of plaintiff's coal mines, see *McKnight v. Ratcliff*, 44 Pa. St. 156; *Post PARTNERSHIP*.

38. In the absence of special circumstances, the measure of damages for the conversion of mining stocks is the value of the property at the time of the conversion, with interest: *Ormsby v. Vermont Copper Co.*, 56 N. Y. 623. Fixed by Code in California: *Fromm v. Sierra Nev. Co.*, 61 Cal. 629.

39. The true measure of damages, in an action for not re-delivering shares lent to the defendant upon a contract to return them on a given day, is not the market price at the time of the breach, but the market price at the time of trial: *Owen v. Routh*, 14 C. B. 327.

40. For the measure of damages on breach of contract by a lessee, to take out coal, where the coal was of greater value to the lessor at the end of the lease than if it had been taken out, see *Powell v. Burroughs*, 8 M. R. 531.

41. Upon the breach of a contract for the sale of shares, the proper measure of damages is the difference between the contract price and the market price at time of breach: *Powell v. Jessopp*, 18 C. B. 336.

42. For the measure of damages for delivering a quality of coal inferior to that contracted for, see *Scott v. Kittanning Coal Co.*, 3 M. R. 159.

43. The measure of damages where the defendant has willfully prevented the plaintiff from proving the real damage, is the utmost value the property could bear: *Lupton v. White*, 2 M. R. 430.

44. The lessor may recover the value of ore wrongfully taken, if its value is less than the royalty agreed to be paid; but the value should be estimated as it lay in the bed: *Stockbridge Co. v. Cone Iron Works*, 6 M. R. 317.

45. The measure of damages for the removal of coal by a lessor after it has been shot down by the lessee, is the value of the coal as it lay in the run: *Lykens Valley Coal Co. v. Dock*, 8 M. R. 570.

46. The measure of damages for breach of covenant by a railroad company to remove its location so as to allow the coal underneath to be won, is the value of the coal left standing to support the surface: *Mine Hill Co. v. Lippincott*, 86 Pa. St. 468; *Post RAILROADS*.

47. The allowance of smart money in cases of simple negligence is improper: *Moody v. McDonald*, 2 M. R. 187.

48. Defendant not liable for gold taken (without intentional trespass) where its value is less than the cost of separation: *Hendricks v. Spring Valley Co.*, 58 Cal. 190; 41 Am. B. 257.

49. Deficiency in crops from loss of irrigating water, allowed as the measure of damages in case of diversion: *Ellis v. Tone*, 53 Cal. 291; *Harrison v. Spring Valley Co.*, 3 W. C. R. 349.

50. Only nominal damages allowed to mining tenant evicted by paramount title: *Lanigan v. Kille*, 97 Pa. St. 120; 39 Am. R. 797.

51. Measure of damages on infringement of oil pump patent: *Mfg. Co. v. Coving*, 105 U. S. 253.

52. On goods contracted for foreign market: *Camden Oil Co. v. Schlens*, 59 Md. 31; 43 Am. R. 537.

53. On failure to deliver ore to carrier under contract: *Bangor Co. v. Magill*, 108 Ill. 656.

54. On breach of contract to build flume, loss of profits to mill not allowable: *Bridges v. Lanham*, 14 Neb. 369; 45 Am. R. 121.

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LOGAN ET AL. V. GREEN ET AL.

(4 Iredell's Eq. 370. Supreme Court of North Carolina, 1846.)

Intermediate vested estate. Merger never takes place when it would have the effect to destroy intermediate *vested* estates in third persons.

¹ **Second lease of term already let.** When there is an outstanding lease and the reversioner makes a new lease to third persons; to commence immediately, this is a vested estate; and although the lessees could not take possession of their term, inasmuch as the possession belonged to the first lessee, they would have a *concurrent* lease, and be entitled to all the rents issuing out of the term of the first lessee, and on the expiration of that term they could legally enter and possess the land for the residue of their own term. This estate would prevent a merger when the first lessee became entitled to the possession.

² **Idem—Purchase of reversion by termor lets in intermediate lease.** But if the deed conveying this second interest created only what is sometimes called a future lease, that is, a contract to have a lease to commence after the expiration of the first lease, then it conveyed no present *estate* in the land, either in interest or possession. It would be only an *interesse termini*, which neither makes a merger nor prevents one, but may be accelerated in the time of its becoming an estate in the land, by possession, by the merger of an antecedent vested term, through the termor's purchase of the next immediate estate in reversion.

³ **No account in favor of party out of possession.** Courts will not decree an account in favor of an owner out of possession until he recovers by law.

Cause removed from the court of equity of Rutherford county, at the spring term, 1846.

Thomas Hall was seized in fee of a tract of land, containing about 100 acres, in Rutherford, and on the 24th of September, 1823, leased it to William Owens for the term of thirty years thereafter, rendering rent, and Owens entered into the premises. The bill charged that the land consisted partly of cultivated and partly of wood land, and that the lease was for the purpose of farming only. In 1824, Hall devised the reversion to Thomas Coggins, and on the 11th of July, 1881, Coggins made to Thomas Dews, John McEntire and John Logan, a lease for thirty years (expressed to be), "to a certain extent, and for certain purposes thereafter to be named,

¹ *Rawlings v. Walker*, 5 B. & C. 111.

² *Agar v. Brown*, 2 El. & Bl. 331.

³ *Sayer v. Pierce*, 1 M. R. 72.

of a certain tract of land, on which William Owens now lives, lying, etc., on the conditions following, viz.: For the special and sole purpose of digging and searching for and extracting the precious metals, if any be there found, on or from any and every part of the said premises;" and granting also such ways, woods, water, stone and timber for machinery, building and other purposes, as might be found necessary and useful for prosecuting the business of opening and working mines on the premises. In consideration whereof it was agreed between the parties that Coggins should be entitled, equally with the three lessees, to the privilege of working in the mines so opened, and using the machinery so to be erected, and draw a proportion of the metals according to the number of hands furnished by each, provided that the number furnished by Coggins should not exceed one fourth—the whole, however, subject to the understanding and proviso, that it should be at the option of the lessees to erect such machinery as they thought requisite, or none at all, and to work or not to work mines on the premises, as they might please. The bill states that the foregoing lease was made with the privity and consent of Owens; and that, shortly thereafter, the lessees entered on the premises and commenced working for gold, Owens then living on the land, and knowing of their operations and making no objection thereto, nor setting up any claim to the minerals in the land. The bill further states that on the 19th of September, 1831, Logan purchased from Coggins the interest in the minerals, and right of working for gold and other metals, to him reserved or secured by the previous lease of July; and that Owens was also present at that time, and made no objection to the contract, but on the contrary, then contracted with Coggins for the purchase of the reversion in the premises, and took from him a covenant to convey the land to him in fee, expressly, however, subject to the rights of Logan, Dews and McEntire, under the said lease and contract; and that, on the same day, Owens agreed in writing, with Logan, that he might erect on the premises a grist-mill, and use it for the term of thirty years, and at the end thereof remove the stones.

The bill then states that "the said company soon ceased to work the mines; and it so remained until about the year 1840,

when the defendants, Green, McDowell and Lord, pretending some right so to do, opened mines on the land and took thereout four or five pennyweights of gold." It is then stated that Dews, one of the lessees died in 1838, having made a will and given all his estate to his father, Thomas Dews, the elder, one of the plaintiffs; and that John Logan died in 1842, having made a will, in which he gave his interest in the premises to George W. Logan, and appointed him and John W. Logan the executors, who are the other plaintiffs.

The bill was filed in 1843, against McEntire, Green, McDowell and Ford, and prays that the three latter may discover what gold they have collected on the premises, and may be decreed to pay to the plaintiffs "such damages, rents and profits, as may be just."

The defendant, Green, states that in 1840 he took a lease of the premises from William B. Owens, a son of William Owens, to whom the latter had made a deed in fee for them; that his lease was for the purposes of mining and was for five years, paying a rent of one sixth part of the gold found; and that he admitted McDowell and Ford under him.

The three then state that they have paid the rent to Owens, and set forth the amount of gold found, which, they say, will not more than compensate for the expenses of working. Green states that before he took the lease he had heard that some contract had been made by Coggins and Dews, Logan and McEntire, respecting the premises, and that he applied to McEntire to know what it was, and whether it was still in force, and was informed by him that there had been such a lease as is stated in the bill, but that soon afterward the lessees, having commenced operations, found the business unprofitable, and abandoned the lease. The defendants deny, that as far as they are informed and believe William Owens was privy to the making of the lease or contract from Coggins and Dews, Logan and McEntire, or assented to the same before or afterward, or agreed that they might open or work any mines under the same. The answer also states that the defendants believe, that Logan did make some verbal contract with Coggins for the purchase of his interest in the metals on the premises, under the previous lease, for some small price, which was paid in a barrel of

flour and seventy gallons of whisky ; but that, after the mines had been found not to be worth working as aforesaid, Logan rescinded the contract with Coggins and took Coggins' bond for the value of the flour and whisky, and afterward received the money thereon.

The plaintiffs took the deposition of James Walker, who says that he knows nothing of the lease to Dews, Logan and McEntire ; but that he was present when Logan and Coggins made a verbal agreement for the sale of Coggins' mineral interest to Logan, which was afterward to be reduced to writing. The witness says he can not state the time, farther than that it was between 1828 and 1831 ; but that William Owens was present and made no objections ; and that some time afterward Logan called on him in Rutherfordton to witness that he was then paying Coggins for his interest in the mine, and let him have some liquor and flour.

All the other testimony for the plaintiffs relates to the proceeds of the mines worked by defendants, Green, McDowell and Ford.

The other defendants, under an order, took the deposition of the defendant McEntire. He says that after the lease from Coggins, he and Logan worked on the land two or three days for the purpose of testing it ; that Owens was opposed to it, but after a while consented that they might test outside of his field, and, after they had done so, he consented for them to test it inside of the field ; that for that purpose they sunk six or seven pits and found but little gold, and then abandoned all idea of working farther, and never went back ; that he gave this information to the other defendants, and gave his consent that they should take a lease from Owens in 1840, but told them he would not act for Logan, who, he believed, still set up some claim.

It is further proved by two witnesses, Cole and Owens, that William Owens, when informed that the lease had been made by Coggins to Dews, Logan and McEntire, expressed much dissatisfaction and would not agree that they should work on the premises even for the purpose of "testing" the mines, that those persons did, nevertheless, go on for a short time ; until they became satisfied that there were no mines worth working, and then abandoned the premises ; that Logan informed

Coggins that they could make nothing, and insisted that he should rescind the contract, and that finally it was agreed to rescind, and that Coggins should pay Logan for certain flour and whisky, which Logan had paid him on the contracts respecting the mines; that, in a few days afterward, Coggins agreed to sell the premises in fee to Owens, and made him a deed, which appears to be dated September 28, 1831, and that Logan, when he heard of it, applied to Owens to secure in his hands Logan's demand against Coggins for the flour and whisky, but was informed that Owens had fully satisfied Coggins for the purchase money, and thereupon he, Logan, took Coggins' own bond to himself for the amount.

No counsel for the plaintiffs.

BADGER, for the defendants.

RUFFIN, C. J.

This is a singular bill, seeking merely an account of the profits of working the mines by some of the defendants, and payment of shares thereof to the plaintiffs, without asking any relief in respect of the title of the land, and without bringing before the court Coggins, under a contract with whom the plaintiffs claim, and under whom also the defendants claim; and without bringing in William Owens, on whose consent to their lease and contract they rely to give them efficacy, and under whom also the defendants claim, who have worked the mines. But, without noticing any objections arising from these circumstances, there are others upon the facts which are decisive against the bill.

It is objected, first, by the defendants' counsel, that the plaintiffs have failed to establish their title, as set forth, under the wills of Dews and Logan, two of the lessees, as they are not admitted in the answers, nor copies of them exhibited. This objection is, of course, fatal; but if there were nothing more in the cause, the court would be disposed to consider it a case of surprise, and allow the proofs to be completed by exhibiting copies of the wills now. It would, however, be of no avail to do so, as there are other grounds on which all relief to the plaintiffs must be denied. In the first place, as far as

the assent of W. Owens, (who was in possession under a previous lease for a term, of which twenty-two years were unexpired,) is material to the validity of the subsequent lease, under which the plaintiffs claim, on which assent, indeed, the bill rests entirely the efficacy of that lease as against Owens, the evidence directly contradicts the statements of the bill. There is no proof whatever of such assent. Although Mr. McEntire, one of the parties to that lease, is examined, the plaintiffs do not even ask him a question upon the point; and it is clear from what he and the witnesses, Cole and Mrs. Owens, all say, that W. Owens did not know of the lease until after it had been made, and that he never did agree to it. It is true, Walker says that Owens was present when Logan made a verbal agreement with Coggins, and made no objection. But that clearly relates to the agreement, subsequent and distinct from the lease between Coggins and Logan alone, for the sale of Coggins' mineral interest, as it is called, under the lease itself; for Walker speaks of the whisky and flour as being paid on the contract to which he deposes, which must refer to the subsequent transaction, since for the original lease itself there was no such consideration as appears upon its face. McEntire says, indeed, that, after at first refusing, Owens consented to let them "test" the mines; which, we suppose, means that he allowed them to make some examinations with the view simply to ascertain whether the land contained gold, or enough of it to be worth working. This he might have done, and as we think, did, as one mode, and perhaps the easiest, of preventing disputes between the parties, as he would naturally expect, if it should turn out there was little gold, that he would have no more trouble upon the subject. That is very different from his yielding to them, as a matter of right under their lease, ingress upon the premises for the purpose of opening and working mines where they pleased.

But, secondly, McEntire says, that, after they had satisfied themselves by "tests," that there was too little gold to make the business worth pursuing, the lessees from Coggins abandoned all idea of it, and there can be little doubt that they so informed Owens. It is natural to suppose so, after what had passed between them, as stated by this witness. But the other two, Cole and Mrs. Owens, state that Logan and Coggins ex-

pressly agreed to rescind. Whether they did it effectually or not, as between themselves, is not material. It is sufficient that Logan and Coggins so represented to Owens, and that, under that belief, he purchased the premises from Coggins as unincumbered and unaffected by either of the previous contracts with Logan, or with him and his associates. Certainly contracts can not afterward be set up with good faith against W. Owens, or any person claiming under him; and especially after lying by, without once setting up the claim, for nine years or thereabouts.

DANIEL, J.

When William Owen, the tenant under Hall, purchased from Coggins the reversion in fee on the land, the two estates, to wit, his term and his reversion in fee then meeting in the same person, would have had the effect of merging the precedent lesser estate in the fee, if there had been no intermediate estate, outstanding in a third person. But merger never takes place when it would have the effect to destroy intermediate *vested* estates in third persons. If Coggins' lessees had been the owners of their term in all the land, and the lease was to have commenced immediately, it would in law have been a vested estate in interest for the term of thirty years, and, although they could not have taken *possession* of their term, inasmuch as the possession belonged to Owens, the first lessee, they would, however, have had a *concurrent* lease, and have been entitled to all the rents issuing out of Owen's term; and, on the expiration of that term, they could have legally entered and possessed the land for the residue of their own term. If the deed from Coggins to Logan and others created only what is sometimes called a future lease, to wit, a contract to have a lease for thirty years, to commence after the lease to Owens, then it would have conveyed no present *estate* in the land, either in interest or in possession. It would have been only an *interesse termini*, which neither makes a merger nor prevents one, but may be accelerated, in the time of its becoming an estate in the land by possession, by the merger of an antecedent vested term by the termor purchasing in the next immediate estate in reversion. *Whitchurch v. Whit-*

church, 2 Peere W. 236; Dyer, 112 (A) 10 Vin. Ab. 204, Vol. 3, and 264 Pl. 3; Sheph. Touch. 106; Preston on Estates, 208, 212, new pages. The deed from Coggins to Logan et al. can not be construed an estate or lease of the land for thirty years, concurrent with the lease to Owens, because the things attempted to be leased in that deed, to wit, minerals, timber and firewood, were not in law capable of being leased, so as to enable the lessee to have a concurrent lease with Owens in those things. Coggins, at the date of his deed to Logan and others, could not himself have entered upon Owens, and opened the mines, cut timber or firewood, without the permission of Owens.

And if he could not do such things himself, it is certain that he could not assign to Logan and others the right to do them. This deed, therefore, conveyed no present estate out of the reversion. It is then to be considered by us as a contract only to have the mineral ores, timber, firewood, etc., at the time of the expiration of the term of Owens. It then is an *interesse termini*, and, coming in between Owens' term and reversion, it can not prevent a merger of his term in his reversion. By that reversion this *interesse termini* was accelerated in the time it was to become an estate, for it was to become an estate as soon as the thirty years' lease of Owens ceased to exist; and it did cease to exist as soon as it was merged, to wit, on the very day Owens purchased the fee from Coggins. The instant Owens' term merged in his reversion that instant the *interesse termini* of Logan and others sprung into an estate, coupled with a right of entry into the possession of the things leased. They had never alienated their interest in the land by any writing. It, therefore, by the Statute of Frauds, still remained in them. But Owens and his son, William B. Owens, and the defendants, have continued in the adverse possession of the land ever since Coggins sold the reversion to Owens, to wit, ever since September, 1831. This bill is an ejectment bill brought to have an account of the profits of land, which has been, and now is in the possession of William Owens and his assignees for many years. This court never relieves in such a case before the plaintiffs recover possession of their term at law. And, *secondly*, the answer of neither of the defendants admits that the two plaintiffs,

George W. Logan and John W. Logan are the executors of John Logan, deceased, or that the said John Logan died testate. The defendants do not admit that Thomas Dews, Jr., is dead testate; and, if that fact appeared, his executor ought certainly to sue, and not his legatee, Thomas Dews, Sr., as he is described in the bill. There is a replication to all the answers, and there is neither any probate nor any copies of the wills of John Logan or Thomas Dews, Jr. We must, for the reasons above mentioned, dismiss the bill with costs to be taxed against the plaintiffs.

Bill dismissed with costs.

PER CURIAM.

STROUT V. THE NATOMA WATER AND MINING COMPANY ET AL.

(9 California, 78. Supreme Court, 1858.)

¹Merger of lien by assignment of stock. Where the holder of a lien upon stock became owner by assignment from the debtor, thus holding both the lien and the title to the security, the lien merged in the higher right, and as to third parties he must be regarded as absolute owner.

A secret equity (as against third parties) can not be maintained in face of the statute requiring the record of assignments.

Idem—Unrecorded assignment of stock. The books of the corporation must constitute the test of the rights of third parties.

Appeal from the District Court of the Eleventh Judicial District, County of El Dorado.

The facts of this case are fully stated in the opinion of the court.

SAUNDERSON & HUGHES, for appellants.

RALSTON & WALLACE, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

¹Otherwise, if no merger intended: *Woodward v. Davis*, 53 Iowa, 94.

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The facts necessary to explain the decision of this case, were substantially these:

1. On the 15th day of October, 1853, John R. Prindle executed a note to Adams & Co. for one thousand five hundred dollars, and pledged to them, as collateral security, two shares of the stock of said company, of about the value of one thousand eight hundred dollars. There was, however, no transfer of the stock upon the books of the company.

2. On the 31st day of January, 1854, Bruce Herrick sued Prindle, and attached the stock. Judgment was recovered for four hundred and twenty dollars and costs, and on the 31st of March, 1854, Herrick assigned the judgment to Adams & Co.

3. After the levy of the attachment, Prindle indorsed the certificate of stock to Adams & Co., and on the 11th day of February, 1854, the secretary transferred the stock to Adams & Co., upon the books of the corporation, subject to Herrick's attachment against Prindle.

4. On the 10th day of July, 1855, James Duffy sued Adams & Co., and attached the stock as their property. Judgment was obtained against Adams & Co. on the 28th of August, 1855, execution was issued, and the stock was sold by the sheriff the 4th of September, 1855, to the highest bidder, when Ralston and Wallace became the purchasers, for nine hundred and thirty dollars.

5. On the 10th of September, 1855, Strout obtained a judgment against Adams & Co., upon which execution was issued the 15th of October, 1855, and levied upon the Herrick judgment; and on the 22d of the same month the judgment was sold by the sheriff to the highest bidder, and the plaintiff became the purchaser for fifteen dollars. On the same day plaintiff caused an execution to be issued on the Herrick judgment, under which the said shares were sold by the sheriff, and the plaintiff became the purchaser, for four hundred dollars.

This suit was brought to compel a transfer of the shares to the plaintiff, and to recover the dividends previously received by Ralston and Wallace. The defendants had judgment in the court below, and the plaintiff appealed.

In the case of *Weston v. The Bear River Co.*, 6 Cal. 425, it was decided by this court, that no transfer of shares in the

capital stock of a corporation is good as against third parties, unless such transfer be entered on the books of the corporation. It was held in that case that "the legislature intended to protect the public from the fraud which might be perpetrated by sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor, by holding him out to the world as the owner of such stock."

It is conceded that the pledge of the stock to Adams & Co., not entered upon the books of the corporation, conferred no rights to them as against Herrick, the creditor of Prindle. The pledge being only a private arrangement between Prindle and Adams & Co., and Prindle being held out to the world by the books of the corporation as the owner of the shares, the pledge was void as against third parties. The principle clearly established by this decision is, that the books of the corporation must constitute the test of the rights of third parties. They can only look to the books as their criterion.

If the shares must be treated as the property of Prindle, so long as he was the ostensible owner, upon the books of the corporation, why should not Adams & Co., under the legitimate application of the same principle, be held as the owners, after the shares were transferred to them? The transfer of the shares upon the books of the corporation to Adams & Co. was absolute and unconditional, except as to the lien of the Herrick judgment. Subject to that judgment, they were, upon the face of the books, the absolute owners.

We can perceive no difference in principle between the two cases. The intention of the legislature was to prevent frauds on third parties, as well as to protect the corporation. The language of the statute is very explicit. By the transfer to Adams & Co., they were the apparent owners of the shares, and the private arrangement between Prindle and them could not affect third parties in any way.

Conceding that Adams & Co. must be regarded as the owners of the shares on the 11th of February, 1854, subject to the lien of the Herrick judgment, what was the legal effect of the assignment to them of that judgment on the 31st of March following?

We think the assignment of the judgment at once merged

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the lien in the higher right, and that Adams & Co., as regarded third parties, became at once the absolute owners of the stock.

"Rights are said to be merged," says Bouvier, "when the same person who is bound to pay is also entitled to receive. This is, more properly, called a confusion of rights, or extinguishment."

See also the opinion in the case of *Clift v. White*, 15 Barb. 70; and same case, 12 N. Y. 519.

The shares being subject to the lien, and Adams & Co. being the owners of the stock, they were compelled to discharge the lien of the judgment to save the stock. This they did by taking an assignment of the judgment. By taking this course, instead of paying the judgment, they retained the right to issue execution against Prindle. But as to the lien upon the property attached, the assignment had the effect to extinguish it.

Judgment affirmed.

1. An easement is extinguished by unity of title and possession: *Coleman's App.*, 62 Pa. St. 252; *Post* TENANT IN COMMON.

2. A judgment against a corporation for a debt for which its officers are personally liable, does not merge the debt so as to extinguish their liability: *Byers v. Franklin Co.*, 106 Mass. 131; *Post* PERSONAL LIABILITY.

3. The final writings merge all prior agreements: *Bragg v. Geddes*, 5 M. R. 624; *Chrisman v. Hodges*, 75 Mo. 413.

4. A note is not merged in an agreement which does not prevent suit on it: *Creighton v. Vanderlip*, 7 M. R. 172.

5. Merger will be inferred or not inferred as justice may require: *Fassett v. Mulock*, 5 Colo. 466.

¹ **BIDDLE BOGGS V. THE MERCED MINING CO.**

(14 California, 279. Supreme Court, 1859.)

Notice of official survey unnecessary. Neither the claimant of land under a Mexican grant, nor the United States Surveyor General is under any obligation to give notice to any one of the official survey of the tract, directed by the final decree of confirmation, and it is of no consequence how secretly, or how openly the survey is made.

Difference between official and private survey—Fraud. The right which the Mexican government reserved to control the survey of the “Mariposas” tract passed with all other public rights to the United States, and the survey must now be made under the authority of the United States, and such a survey is the only one which has any standing in court. The government is not bound by a private survey made by the claimant and presented with his petition for confirmation, and the fact that such survey differs from the official survey is not ground for charging fraud upon the claimant.

² **Patent can not be collaterally attacked for fraud.** A patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land. It can not be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey.

Patent conflicting with vested rights. Individuals can only resist the conclusiveness of a patent by showing that it conflicts with prior vested rights, and even then the patent would only be inoperative to the extent of such conflict, not void.

Parties in bill to set aside patent. It is a fatal objection to a bill in equity to set aside a patent for fraud in its procurement that the patentee is not a party.

Patent, how annulled. To annul a patent absolutely, proceedings can only be taken by the government or some individual in its name, and that by *scire facias*, or by bill, or information.

³ **Estoppel as to title by admissions and declarations.** A party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle, with respect to the title of prop-

¹ A writ of error to the Supreme Court on this case was dismissed for want of jurisdiction: 3 Wall. 309.

² *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636; *Post* **PATENT**; *Steel v. St. Louis Co.*, 106 U. S. 447; *Poire v. Wells*, 6 Colo. 406.

³ *Patterson v. Hitchcock*, 5 M. R. 542.

erty, it must appear: 1, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; 2, that he made the admission with the express intention to deceive, or with such culpable negligence as to amount to constructive fraud; 3, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, 4, that he relied upon such admission, and will be injured by allowing its truth to be disproved. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another. Tested by these rules the matters set up can have no operation by way of estoppel.

Government not estopped by representations of claimant. Though a party represent to another that certain grounds are public land, and thus induce the latter to enter and occupy the same, the former will not thereby be estopped to acquire a title from the government, for the government can not be estopped by such representations from asserting its title and disposing of the land to whomsoever it thinks proper.

¹**The rights of the miners in California.** There was never (prior to 1866) any license from the government to the miners on the Pacific Coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government. In controversies between parties on government land, where neither have absolute rights, the presumption of a grant to the first appropriator is simply a rule of convenience, having no place for consideration as against the superior proprietor.

Government entry upon private lands. The United States could not enter nor authorize an entry upon private property for the purpose of extracting minerals. The United States, like any other proprietor, could only exercise the rights to the minerals in private property in subordination to such rules and regulations as the local sovereign might prescribe.

Appeal from the Thirteenth District.

Ejectment for premises situate in Mariposa county. Plaintiff was the lessee of John C. Fremont, to whom a patent was issued by the United States, bearing date February 19, 1856, embracing a tract including the premises in controversy. The case was tried by the court without a jury by consent of parties. The court found the facts to be as follows:

1. That John C. Fremont, at the time of demising the premises sued for, to the plaintiff, as stated in complaint, was the owner, and seized in fee simple of the tract of land called "Las Mariposas," mentioned in the complaint, by virtue of a patent from the United States, dated the 19th day of Febru-

¹ *Merced Co. v. Fremont*, 7 M. R. 313.

ary, 1856, signed by the President of the United States, countersigned by the Recorder of the General Land Office, and sealed with the seal of said office, and granting to the said Fremont, his heirs and assigns forever, the said tract of land called "Las Mariposas," according to the plat and survey thereof made and approved by the United States Surveyor-General for California, on the 31st day of July, 1855, as stated in the complaint, and that the said Fremont entered on said tract of land called "Las Mariposas," claiming title thereto under said patent.

2. That the premises sued for in this action are parcel of the said tract of land, so as aforesaid granted and patented by the United States to the said Fremont.

3. That on the 22d day of April, 1857, the said John C. Fremont (by Rufus A. Lockwood, his attorney in fact in that behalf, duly authorized) being seized, as aforesaid, of the said tract called "Las Mariposas," executed and delivered to the plaintiff the deed set out in said complaint, and thereby bargained, leased and demised the premises sued for, to the plaintiff, for the term of seven years then next ensuing, as stated in the complaint; and that by virtue of said deed the plaintiff thereupon became, and still is, the owner of the premises sued for, with the appurtenances, and entitled to the possession and use thereof, for the said term of seven years.

4. That there are appurtenant to the premises sued for, affixed to the soil, and freehold, and parcel thereof, a quartz mill, machinery, fixtures, and other buildings and works, known as the "Mount Ophir Reduction Works," and that the same were, and are included in the said lease and demise to the plaintiff, and that the plaintiff is in like manner owner of, and entitled to, the possession and the use of the same for the said term of seven years.

5. That at the commencement of this action, to wit, on the 23d day of April, 1857, the defendant was, and ever since has been, and still is, in possession of the premises sued for with the appurtenances, and occupying and using the same, and claiming and holding the same, without the consent and against the will of the plaintiff, and adversely to the title of the plaintiff, and of his said lessor.

6. That the defendant has been running and working said

mill and machinery a part of the time since the commencement of this suit, when there was sufficient water for the purpose, but the defendant is not now running or working the same, for want of sufficient water; that the creek on which said mill is erected does not afford sufficient water, at all times, to run said mill; that said creek does not become entirely dry, but that the water does not now run in the same where said mill is, and will not probably run there during the dry season, which usually continues till late in November.

7. That the wear and tear of said mill and machinery from running and working the same, amounts to the sum of three hundred dollars per month while the same is run and worked, but in order to work the same to advantage, it is necessary to keep the same constantly in repair, and the defendant has done so since the commencement of this suit.

8. That the monthly value of the said premises amounts to the sum of seven hundred and fifty dollars.

9. That the defendant is guilty of the trespass and ejectment laid in the complaint; and that the plaintiff has thereby sustained damages at the rate of seven hundred and fifty dollars per month, from the commencement of this suit hitherto, making in all the sum of sixteen hundred and ninety dollars.

10. That the defendant continues to exclude the plaintiff from the premises, and to detain the same from him; and that the defendant intends to continue to run and work the said mill and machinery against the will of the plaintiff; and assuming the admissibility of all the evidence produced by the defendant, the court further finds:

11. That the survey and plat set forth in said patent to said Fremont, and mentioned in the defendant's answer, are within the limits described in the original grant to Alvarado, confirmed to said Fremont, as mentioned in said patent.

12. That the charge set up in the defendant's answer, of fraud, concealment and collusion, in the survey and certificate on which said patent issues, is not proved.

13. That the charge in the defendant's answer, that, in procuring the issuance of said patent, a fraud was practiced upon the government in misrepresenting the quality and char-

acter of the lands embraced in the survey and patent, is not proved.

14. That the lands embraced in the patent to Fremont are mineral lands, containing gold-bearing quartz and placer gold mines; that the lands are rough and hilly, but there are small ranches on various portions of the land. A portion of the hills and valleys is also used for grazing cattle, and to some extent for raising and cultivating vegetables and grain, but the principal business of the settlers on said lands is mining.

15. That in May, 1851, the premises sued for were vacant and unoccupied; that the defendant then entered upon said premises under a quitclaim deed from one Moffat, but it is not shown that said Moffat had any title to the premises, but on the contrary, the premises were then the public domain of the United States, except so far as the same were subject to Fremont's unconfirmed right to locate the Alvarado grant within the limits therein prescribed; that the defendant commenced improving the premises for mining purposes, in 1851, and has ever since used and occupied the same for such purposes, pursuant to the mining regulations prevailing in the district, and has made improvements and expenditures in the manner and to the extent stated in the answer; and that until the month of July, 1855, Fremont never claimed the premises sued for as being within the lines of his Alvarado grant, but stated that the lines of his grant did not approach within one or two miles of the premises, and caused a survey of his claim to be made in 1852, the lines of which did not include the premises; and which survey the said Fremont published and represented as including the tract of land claimed by him under said Alvarado grant, but at the time of making such representations and disclaimers said grant had not been finally confirmed and located; and it is not shown that in making such representations and disclaimers, the said Fremont willfully made any misrepresentations, or intended to deceive, or defraud, the defendant or others, nor that he intended thereby to influence the conduct of defendant.

16. That Fremont knew of the occupation, claim, working and improvements of the defendant from the time the defendant took possession till the present, without claiming the premises sued for till July, 1855, and without forbid-

ding the defendant from working or improving the same, though he knew the defendant claimed the property; and that the said Fremont made the representations and disclaimers stated in the fifteenth finding, but without any fraudulent intent, and before the final location of his claim, and when it was unknown where the lines thereof would be fixed.

17. That no facts amounting to fraud, or to a legal or equitable estoppel, are proved in this cause, either as against the plaintiff, or as against his lessor, the said Fremont. And upon the said pleadings, stipulations, proofs, and facts, the court decides and finds the following points and matters of law, to wit:

1. That it is not competent for the defendant to attack or impeach the patent mentioned in the complaint and answer.

2. That the plaintiff is not estopped from insisting on his legal title to the premises sued for.

3. That the defendant is not entitled to any legal or equitable relief against the plaintiff's title.

4. That the plaintiff is entitled to the judgment and decree of the court, against the defendant, for the recovery of the possession of the premises sued for, as described in the complaint, with the appurtenances, and for the sum of sixteen hundred and ninety dollars, damages and costs of suit, and it is ordered that judgment be entered accordingly.

It is therefore considered, adjudged and decreed by the court, that the said plaintiff, Biddle Boggs, do have and recover of and from the said defendant, the Merced Mining Co., the possession of said premises set forth in said complaint, and described as follows, to wit: Beginning at a point where a line drawn from the northeast corner of township No. 5, south, range No. 17, east, and running south twenty-four and a half degrees west, one hundred and twenty-nine chains, will terminate (said point of beginning being on the south side of the road leading from Mariposa to Stockton, by way of Mount Ophir), and running thence south forty chains to a stake; thence west forty chains to a stake; thence north forty chains to a stake near said road; and thence east along the direction of the said road forty chains to the place of beginning, and containing one hundred and sixty acres (being part and parcel of the tract known as "Las

Mariposas”), together with all the tenements, hereditaments, works, mills, machinery, fixtures, buildings, and appurtenances whatsoever thereunto belonging, and including the works known as the “Mount Ophir Reduction Works.”

And it is further considered, adjudged and decreed by the court, that the said plaintiff do have and recover of and from the said defendant, the sum of sixteen hundred and ninety dollars, in damages by the court found and assessed, together with his costs and charges in this behalf laid out and expended, taxed at the further sum of ——— dollars, and that the plaintiff have a writ of possession and execution against the defendant accordingly.

The judgment of the lower court in this important case was for the plaintiff, Fremont's lessee, and against the mining company in possession, and working the mines.

At the January term, 1858, BURNETT, J., delivered the opinion of the court, reversing the decision of the court below, remanding the cause, and directing the court below to enter judgment for the defendants.

TERRY, C. J., concurred in the judgment and doctrine of the justice delivering the opinion of the court, holding, however, that it was sufficient for the purposes of the case that the title to the gold did not pass by the grant of the Mexican government to the plaintiffs, and that whether the right to the mines was vested in the United States or in the State of California was a question with which the plaintiff had no concern; and as to the latter question, and, therefore, as to the correctness of *Hicks v. Bell*, relied upon in the leading opinion, he expressed no opinion.

FIELD, J., dissented.

A rehearing was, however, granted, and the case was again argued at the July term, 1858.

MESSRS. S. W. INGE, HALLECK, PEACHY & BILLINGS, GREGORY YALE and ELISHA COOK, for appellants.

MESSRS. HEYDENFELT & BALDWIN, and D. W. PERLEY, argued the case a second time, at great length, and filed elaborate and learned briefs for respondents.

Before any decision was rendered on the rehearing, how-

ever, and at the October term, 1859, the cause was a third time argued by S. W. INGE and ELISHA COOK, for appellants, HEYDENFELT and BOTTS, for respondents, and thereupon the judgment of the court was finally rendered by FIELD, C. J. (COPE, J. concurring), overruling the former decision of BURNETT, J., in the same court, and affirming the judgment of the court below in favor of the plaintiff.

FIELD, C. J., delivered the following opinion.

In 1844, Micheltorena, then governor of California, issued to Juan B. Alvarado a grant of a tract of land, known as "Las Mariposas," to the extent of ten square leagues, lying within designated boundaries embracing a much greater quantity. In 1847 Alvarado conveyed, for a valuable consideration, his interest in the tract to John Charles Fremont. In January, 1852, Fremont presented his claim, under the grant, to the United States Board of Land Commissioners for confirmation, and in December of the same year the claim was confirmed. On appeal to the United States District Court, the decision of the board was reversed; but on appeal to the Supreme Court of the United States, the claim was adjudged to be valid, and the cause was remanded to the district court for further proceedings. In pursuance of the mandate of the Supreme Court, a final decree of confirmation was entered in June, 1855. In July following, the specific quantity designated in the grant—ten leagues—was surveyed and segregated from the general tract embraced within the exterior boundaries of the grant, under the direction of the surveyor-general of the United States for California, and the survey was subsequently approved by that officer. Upon this survey and the decree of confirmation, a patent was issued on the part of the United States to Fremont, bearing date on the 19th of February, 1856, signed by the president, and countersigned by the acting recorder of the general land office at Washington. The patent refers to the proceedings before the land commission, the appeals, and the judgments, both of the District and of the Supreme Court, the final decree of confirmation, the survey thereunder and its approval, and, in terms, grants the land, with the specific description of the approved survey, to

Fremont and his heirs and assigns forever. This patent includes the premises occupied by the defendant, and after its receipt Fremont leased them to the plaintiff for the period of seven years, at the monthly rent of one thousand dollars. For their recovery the lessee brings the present suit. These premises contain ledges of gold-bearing quartz, and the defendant entered into their possession in May, 1851, and between that period and the issuance of the patent to Fremont, erected thereon, at great expense, machinery and mills for excavating and crushing the rock and extracting the gold, and has continued in the occupation of the premises, working the quartz veins and extracting the gold ever since. The lease, in terms, covers these various works, which are, as the complaint alleges, fixed to the soil and a part of the freehold.

To resist a recovery, the defendant relies upon three grounds: 1st, fraud in the survey of the Alvarado grant and the procurement of the patent by Fremont; 2d, estoppel from the declarations and conduct of Fremont, and, 3d, a license from the government to enter upon the premises and extract the gold. It was stipulated between the parties, previous to the trial, that the defendant might have any affirmative relief which it would be entitled to upon filing a crossbill to the action, or an original bill setting up the facts contained in the answer; and might set up any equitable defense which it would be entitled to set up in a court of chancery to the case made in the complaint.

* The effect of the first clause of the stipulation we conceive to be this; that if the facts alleged in the answer, and established by the proofs, could, in any proceeding at law or in equity, be urged by the defendant against the prosecution of the present action, they may be urged in this case without regard to the form of the action, or the character of the pleadings. As to the second clause of the stipulation, the parties appear to have construed it to mean that the defendant might, upon the development of the proofs, without reference to the allegations of the answer, interpose any defense which a court of equity would sustain to the case set forth in the complaint.

We shall, for the determination of the appeal, follow this

construction, liberal as it is, without considering an objection which might be, but is not, taken, that the court can not properly, even upon the consent of parties, pass upon questions not raised by the written allegations of the pleadings.

As to the charge of fraud in the survey, and the procurement of the patent, the answer sets forth that the grant to Alvarado, which is the basis of the claim of Fremont, was issued upon a petition for agricultural and grazing land, of the extent of ten square leagues, to be located within exterior boundaries embracing over one hundred; that neither in the petition nor in the grant was any particular description given of the specific quantity granted; that no survey or location of this quantity was attempted until 1849, when a survey was made of the ten leagues by Fremont in the valley of the Mariposas, and a map of the same published to the world; that the lines of this map do not approach, within a distance of two miles, the premises in controversy; that this map was annexed to the petition of Fremont presented to the board of land commissioners for the confirmation of his claim, and that by the decree of the board the claim was confirmed to the land described in it; that until the decision of the Supreme Court, in December, 1854, Fremont persisted in claiming the land thus designated, and disclaimed ownership in, or title to, the mineral lands in controversy, but that after that decision, and in July, 1855, he "caused and procured" another survey to be made, which includes these lands; that this survey was approved by the surveyor-general, and that the same was fraudulent in this: that it was made clandestinely by the agents of Fremont, who carefully concealed from the defendant his intention to include the mineral lands and veins in controversy, knowing that the grant to Alvarado, qualified and controlled by the petition of Alvarado, called only for grazing and agricultural lands, and that under the decision of the Supreme Court, he was entitled to a location upon none other.

The answer contains no other allegations of fraud in the last survey than this concealment, and the variance from the original survey made in 1849; but, when the cause was called for trial, the defendant filed an affidavit to the effect that he expected to prove by the attorney-general of the United States and the commissioner of the land office at

Washington, that, in procuring his patent a fraud was perpetrated upon the government by Fremont, in misrepresenting the quality and character of the lands embraced in the survey, and by several other witnesses, that the survey was made and concealed at the time from the defendant and all others claiming adversely to Fremont.

It was therefore admitted, for the purpose of preventing a continuance, that the several witnesses named would, if present, respectively testify, as stated in this affidavit, and that their testimony should be considered as actually given on the trial, or as offered and overruled by the court as improper. The testimony thus assumed was offered, and, for all the purposes of this case, must be deemed as actually before the court. That portion which relates to the alleged clandestine survey was met on the trial by counter proof, and negatived. The court passed upon the point, and found against the charge; and its finding, in this respect, is fully warranted by the evidence. But even were this not so we are unable to perceive that it would make any difference. There was no obligation resting either upon Fremont or the surveyor-general to give notice of the survey to the defendant, or any one else, and it is of no consequence how secretly or how openly the survey was made. That portion of the charge which relates to the alleged misrepresentation of the quality and character of the land, is conclusively answered by the proceedings in the Supreme Court of the United States, to which reference is made in the record and in the argument of counsel. The alleged misrepresentation consists in the fact that the land is mineral, whereas, it is said in argument (for nothing of the kind appears in proof), that it was represented to be exclusively grazing and agricultural. The fact that the land contained mines of gold and silver was before the Supreme Court, and constituted one of the grounds upon which the attorney-general based his argument against the confirmation of the claim. To his objection on this head the court said in its opinion: "In relation to that part of the argument which disputes his right upon the ground that his grant embraces mines of gold or silver, it is sufficient to say that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only

question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851." 17 How. 565. That the land claimed by Fremont was mineral, or believed to be mineral, was thus well known to the government, as is manifest from the argument of the attorney-general and the decision of the court; and in the face of these public acts the charge of misrepresentation as to its quality and character, falls to the ground. The entire charge of fraud, then, rests upon the simple fact that the official survey, obtained by Fremont, differs entirely from his own original survey. That this private survey—accompanying his petition to the land commissioners—was not binding upon the government, is too clear for argument.

In *Smith v. U. S.*, 10 Pet. 334, the Supreme Court says: "The laws of the United States give no authority to an individual to survey his grant or claim to lands; he may mark lines to designate the extent and bounds of his claim but he can acquire no rights thereby."

In *United States v. Hanson*, 16 Pet. 199, a private survey was considered and rejected, as being of no force or validity. In *Les Bois v. Bramell*, 4 How. 449, in speaking of a survey of one Mackay, the court said: "It was a private survey, and made at the instance of the inhabitants of St. Louis, and not binding on any one;" and in *Mackay v. Dillon*, 4 How. 421, of the same survey: "It was in its nature a private survey, no binding upon the United States." In *Glenn v. United States*, 13 How. 256, in referring to surveys offered in evidence, the court said: "The surveys produced to us are private ones, and of no value in support of the claim."

It is true, the decree of the land commission confirmed the claim of Fremont to the land described in his survey, but that decree was reversed by the district court, and when the case was remanded to the district court from the Supreme Court, it was accompanied with directions to take further proceedings in conformity with the opinion of the latter court. In that opinion, allusion is made to the form of the survey, which

was to follow. "Some difficulty," says the court, "has been suggested as to the form of the survey. The law directs that a survey shall be made, and a plat returned, of all claims affirmed by the commissioners. *And as the lines of this land have not been fixed by public authority*, their proper location may be a matter of some difficulty. Under the Mexican government the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form as would be inconvenient to the adjoining public domain, and impair its value. *The right which the Mexican government reserved to control this survey passed, with all other public rights, to the United States; and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract.*"

Upon filing the mandate of the Supreme Court, the district court, in entering the final decree of confirmation, in June, 1855, conformed to the opinion of that court, and ordered that the land be surveyed according to its direction. It is upon this decree, and in pursuance of it, that the survey, which is the subject of complaint, was made and approved by the surveyor-general of the United States, for California. No other or previous survey has any standing in court, or can, in any respect, affect the rights of the grantee. That Fremont "caused and procured" the survey to be made, does not imply the use of any improper influences for that purpose. That he applied to the proper officers to make the survey, is no doubt true; but that he employed any means to improperly control their action, there is no evidence, and that the survey was made secretly, or concealed after it was made, is, as we have already observed, contradicted by the testimony.

The grant to Alvarado passed a present and immediate interest to ten square leagues, to be afterward surveyed and laid off within the exterior limits of the general tract by the government. Such survey could only be made under the former government by its officers, and could not be made by the grantee himself. This right of survey passed, with all

other public rights, to the government of the United States, upon the cession of the country, and is now to be exercised by its officers, and in conformity with its laws. By the legislation of Congress, the subject of surveys is intrusted to the executive department of government, and is not left to the direction or control of the grantee. The action of that department in the location of confirmed grants, when the quantity granted is without specific boundaries, lying within a larger tract, is conclusive and binding upon him. It may be true that under the recent decision of the Supreme Court in the *Rossat Case*, the United States District Court possesses jurisdiction to control the location made upon its decree, while the proceedings for confirmation are pending before it; but, subject to this qualification, the action of the department in the case mentioned is a finality with the claimant.

We have considered at length the charge of fraud interposed to the recovery, to show its groundless character; but the true answer to objections of this and the like nature, if capable of being established to their full extent, is that they are inadmissible in an action of ejectment to impeach the patent. In the case of *Moore v. Wilkinson*, 13 Cal. 478, decided in this court at the April term, we had occasion to consider how far the conclusiveness of a survey and patent could be questioned in an action of ejectment. In that case, the defendants claiming to be pre-emptioners of the premises in controversy, under the laws of the United States, offered parol evidence to show that the four leagues, as surveyed and patented to the plaintiff, were different from the tract designated in the grant upon which the patent issued, and the map to which the grant made reference, and that a correct location of the tract as granted would not include the premises in suit. The court below excluded the evidence, and in sustaining its ruling, we said: "The government has provided a board for the determination of the validity of claims to lands held under Mexican grants, and a system for the survey and location of the lands upon the recognition and confirmation of such claims. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination—the judgment of the ap-

propriate department of government, that the survey does conform to such decree. That determination or judgment is not the subject of review by the judiciary. It is conclusive upon the courts in actions of ejectment, as the adjudication of a competent tribunal, upon a subject within its exclusive jurisdiction. The patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land. It can not be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. For these matters the right of interference rests only with the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them. And this brings us to the inquiry whether the defendants possess any such prior rights. The 15th section of the act of Congress of 1851, provides that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties; and in *Waterman v. Smith*, 13 Cal. 373, we held that the third persons mentioned in the act were those whose titles were, at the time, such as to enable them to resist successfully any action of the government respecting it. The patent took effect by relation, at the date of the presentation of the petition of the patentee to the board of land commissioners, in March, 1852. At that time the pre-emption laws of the United States, under which the defendants assert their acquisition of rights, were not extended to California. Any rights which they possess were subsequently acquired, and must be subordinate to the result of the proceedings then pending by the grantees before the tribunals and officers of the United States. Those proceedings had for their object the recognition of the grantee's claim, and the determination of its location with such precision as to leave no room for subsequent dispute and litigation.

If settlers, after steps taken for confirmation, could, by location, acquire such rights to the premises as to authorize them to compel a patentee, in every suit for the recovery of his land, to establish the correctness of the action of the officers of government in their survey and location, the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation, and the settlement of land titles in the country be delayed a quarter of a century. The patentee would find it established in different suits, to the utter destruction of his rights, that his land should have been located in, as many different places within the exterior boundaries of the general tract, designated in his grant, as the varying prejudices, interests or notions of justice, of witnesses and jurymen might suggest."

The views here expressed are applicable to the case at bar, and are conclusive of the point that the defendant can not—treating this as an action of ejectment—set up fraud in the survey or the procurement of the patent, to defeat the action of the plaintiff. We do not here express any opinion as to the rights of the defendant. These we shall hereafter consider. If it be assumed, for the present, that they are vested so as to avail the defendant against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent, not that it was void. The right of the defendant would, in that case, be effectually protected by the provisions of the 15th section of the act of 1851, and the patent would be like a second deed to premises previously granted, and pass, as to the property, no interest.

Nor would the facts set up in the answer, as fraudulent, if presented in an original or cross-bill, avail the defendant in avoiding or resisting the patent. The effect of the matters alleged by way of estoppel we shall hereafter consider. We now speak of the charge of fraud, consisting in the variance between the private and the official survey, and the alleged concealment of the latter. Misrepresentation to the government of the quality and character of the land is not averred in the answer, and if it were, the allegation would not change the case. The charge of misrepresentation and concealment, as we have seen, are without foundation in

fact, and the change in the survey was the act of the government, and not of the patentee; these matters, then, would give the defendant no title to relief in a court of equity.

But there is another and a fatal objection to any equitable suit of the nature supposed. Fremont is not a party to this action, and he would be a necessary party to any proceeding to avoid or set aside his patent, on the ground that it was issued through fraud or misrepresentation. His rights can not be determined or impaired in any side suit between third parties.

The proceeding by bill in equity, which an individual is allowed to take to set aside a patent, or control its operation, is in the nature of a bill to quiet title—to determine an estate held adversely to him—to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must therefore possess a title superior to that of his adversary, and, of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name.

Thus, in *Gaines v. Nicholson*, 9 How. 364, the plaintiffs, as trustees of schools and school lands, of a township in Mississippi, claimed the 16th section of the township as appropriated for the use of schools, under certain acts of Congress. By provisions contained in a treaty with the Choctaw tribe of Indians, certain lands were reserved to several members of the tribe, and, among others, to one Wall—to be located in entire sections, and to include their residence and improvements at the time. Wall conveyed his interest in the section reserved to him to parties, who, representing that he resided upon the 16th section of the township at the date of the treaty, and had his improvements thereon, obtained a patent from the president of the United States, and then brought ejectment against the tenant of the trustees in possession of the premises. The trustees, thereupon, filed a bill to stay the proceedings at law, and prayed for a temporary injunction in the first instance, and, afterward, a perpetual injunction,

alleging that the representation as to the residence and improvements of Wall—upon which the patent was issued—was false and fraudulent. The court below decreed a perpetual injunction, and directed the patentees to relinquish their interest to the trustees. The appellate court, after stating the facts of the case, and referring to the alleged false and fraudulent misrepresentation says:

“This is the ground set forth by the complainants upon which to invoke the equitable interposition of the court, to set aside and annul the patent, and remove the incumbrance from their title, and to stay the proceedings at law. And, undoubtedly, if the facts thus charged have been established by the proceedings and proofs, a right to such equitable interposition for the relief sought has been made out, and the decree of the court below should be upheld.”

Here the trustees asserted a title, which, upon their allegation, was superior to that of the government at the time the patent issued, and though the suit is stated in the opinion of the court to be to set aside and *annul* the patent, it was, in fact, as appears from the pleadings and judgment, only to stay proceedings at law and remove the cloud upon the title. In that particular case, the effect of the suit, had the decree been sustained, would have been the same upon the rights of the patentees as if it had been brought to annul the patent absolutely. But, in many cases, the effect would be very different. A decree annulling a patent destroys it absolutely; a decree setting aside or restricting its operation to the premises in controversy, still leaves it unimpaired in other respects. To annul a patent absolutely, proceedings can only be taken by the government, or some individual in its name, and that by *scire facias*, or by bill, or information. Individuals can maintain no proceedings to that effect, the question being one exclusively between the sovereignty issuing the patent and the patentee. Thus in *Jackson v. Lawton*, 10 Johns. 24, where two patents were issued for the same premises, Kent, C. J., said:

“The elder patent must therefore be impeached and set aside before we can acknowledge any title set up under the younger patent; and the question is, whether it can be impeached by parol proof in this suit. Letters patent are matters

of record, and the general rule is that they can only be avoided in chancery by a writ of *scire facias*, sued out on the part of the government, or by some individual prosecuting in its name. This is the settled English course, sanctioned by numerous precedents; and we have no statute or precedent establishing a different course." And, again:

"If the elder patent, in the present case, was issued by mistake, or upon false suggestions, it is voidable only; and unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity or mistake is directly put in issue. The principle has been frequently admitted that the fraud must appear on the face of the patent, to render it void in a court of law; and that when the fraud or other defect arises on circumstances *dehors* the grant, the grant is voidable only by suit. The regular tribunal for this purpose is *chancery*, founded on a proceeding by *scire facias*, or by bill or information. It would be against precedent, and of dangerous consequences to titles, to permit letters patent (which are solemn grants of record) to be impeached collaterally by parol proof in this action."

In *Field v. Seabury*, 19 How. 332, the point was presented whether, when a grant or patent of land, or legislative confirmation of titles to land, has been made by the sovereignty or legislative authority only having the right to make it, there being no provision in the patent by law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party could raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant; and the court, after stating that it was not aware that such a proceeding was permitted in any of the courts of law, said further: "In England a bill in equity lies to set aside letters patent obtained from the king by fraud: *Att'y-Gen. v. Vernon*, 1 Vern. 277, 370; the same case, 2 Ch. Rep. 353; and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee."

But it is unnecessary to pursue this point further, for even if the defendant possessed a title to the premises, no matters

are shown, as we have already observed, which would authorize any equitable interference of the court with the claim of the plaintiff on the ground that the survey was made and the patent procured by fraud.

We pass to the second ground of defense, that of estoppel. The only matters alleged in the answer by way of estoppel are the private survey of Fremont in 1849, and his presentation of the same to the board of land commissioners, as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him at the time the defendant took possession of the premises in controversy in 1851, and afterward, up to July, 1855, of any title or claim to the property, and of any title or claim to any land within the exterior bounds of the grant to Alvarado, except that designated in his survey.

Upon these declarations, the answer avers the defendant acted, and was induced to make valuable and permanent improvements upon the premises in controversy and adjacent property, at an expenditure of upward of eight hundred thousand dollars; and insists that the plaintiff is thereby estopped from asserting any title under Fremont. Other matters are also urged by way of estoppel, not alleged in the answer, and which, but for the stipulation of the parties, would not be considered by the court. In the affidavit for a continuance, to which we have already referred, it was stated that the defendant expected, by several witnesses named, to prove that from the time possession was taken of the premises to that date, Fremont knew of the claim of the defendant to the property, and its occupation and improvement, and never set up any title to the same until July, 1855, or forbid the occupation and improvement. To prevent the continuance, it was admitted that the witnesses, if present, would testify as stated, and that their testimony should be deemed as actually given, or as offered and overruled as improper.

The court passed upon these matters, and found that up to July, 1855, Fremont claimed the premises in his survey, and made the representations and disclaimers alleged to the property in controversy, but that it was not shown that he *willfully made them, or intended to deceive or defraud the defendant, or to influence its conduct*, but that they were

made "*without any fraudulent intent and before the final location of his claim, and when it was unknown where the lines thereof would be fixed,*" and that he knew of the occupation and improvements of the defendant from the time possession was taken, without forbidding the same or claiming the premises, until July, 1855.

It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear, *first*, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

These qualifications in the application of the doctrine will be found fully sustained by the authorities. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another. "In all this class of cases," says Story, speaking of equitable estoppels, "the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which, in effect, implies fraud. And therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has accordingly been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud." 1 Story's Equity, Sec. 391.

"In order to the introduction of this equity," says Adams, in his treatise on the doctrine of equity, "it is essential that there be intentional deceit in the defendant, or, at all events,

that degree of gross negligence which amounts to evidence of an intent to deceive." Side page, 151.

In *Com. v. Moltz*, 10 Barr, 531, the Supreme Court of Pennsylvania, after citing several cases in which the doctrine of equitable estoppel was applied, said:

"In all these cases, there is some ingredient which would make it a fraud in the party to insist on his legal right." Per Sergeant, J. in *Crest v. Jack*, 3 W. 238. And, again: "To the constitution of this species of estoppel, at least three ingredients seem to be necessary: first, misrepresentation, or willful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done, and, thirdly, that injury would ensue from a permission to allege the truth. *And these three things must appear affirmatively.*"

In *Copeland v. Copeland*, 28 Maine, 539, the Supreme Court of Maine, in considering the nature of these estoppels, after quoting the language of Lord Denman, in *Pickard v. Sears*, 6 Ad. & El., 469, "that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things, as existing at the same time," said, "in this position, thus established, it must be observed, that several things are essential to be made out in order to the operation of the rule; the first is, that the act or declaration of the person must be willful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement."

In *Whitaker v. Williams*, 20 Conn. 104, the Supreme Court of Connecticut, in considering the same subject, said: "The doctrine that one shall not be permitted to retract representations, in which is included conduct by which he has induced another to adopt a particular course of action, sup-

poses, and is to be understood with the qualification, which is, indeed, a part of the principle itself, that the one by whom such representations were made, had a knowledge of his rights. In laying down this qualification, we speak of the principle generally, and would not be understood to say that there may not be cases where there is such culpability on the part of the person making such representations, or such particular circumstances or consequences attending them that he would not be permitted to set up the want of such knowledge."

In *Delaplaine v. Hitchcock*, 6 Hill, 16, the Supreme Court of New York, per Bronson, J. said : "The mouth of a party will sometimes be closed after he has omitted to speak at the proper time, and thus has been the occasion of misleading a third person. But there is no such thing as an estoppel *in pais* for neglecting to speak or act, where the party did not know the facts which, if known, would have made it his duty to speak or act. An estoppel *in pais*, is a moral question. It can only exist where the party is attempting to do that which casuists would decide to be a wrong; something which is against good conscience and honest dealing." 8 Wend. 483; 3 Hill. 215, 220.

In *Brewer v. Boston & Worcester Railroad Corp.*, 5 Met. 479, the demandant brought a writ of entry to recover a parcel of flats appurtenant to his upland. The case was submitted to the court on a statement of facts, from which it appeared that the demandant, and one Tolman, under whose wife the tenants claimed, had agreed by parol upon a dividing line between the flats appurtenant to their respective lands, and in the language of the statement, "the demandant always claimed to own the flats lying northeasterly of said line, and exercised various acts of ownership on the same. He stated to the agent of tenants, before they purchased the land and flats of said Tolman and wife, that the land which he claimed lay northeasterly of said line, and that he did not claim the land southeasterly of said line, and he has also made similar representations to others. After the tenants purchased of Tolman and wife, they proceeded, with the knowledge of the demandant, to fill up said land lying southeasterly of said line, and to erect buildings and fences thereon, and exercise other acts of ownership on the land, and the demandant was fre-

quently present and saw said improvements, and pointed out the said line, and never expressed any dissent to said proceedings, nor gave any notice to the tenants that he had any claim to the said land."

Upon this statement of facts it was agreed by the parties that if the court should determine that the demandant was entitled to the flats, he should recover in conformity to certain lines, unless the court should determine that the demandant was estopped as against the tenants from claiming the same. The court adjudged a recovery in favor of the demandant, stating in its opinion that it decided the case on the ground that the demandant had acted fairly, under a mistake, and that he had made no declarations contrary to his honest belief at the time, or with any intention to deceive the tenants. "And we think it clear," said the court, "that the declarations thus made do not operate in the nature of an estoppel. A party is not to be estopped to prove a legal title to his estate, by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective; for he may require a warranty, and it would be most unjust that a party should forfeit his estate by a mere mistake."

These authorities are sufficient to show the correctness of the qualifications we have placed upon the application of the principle of equitable estoppel. They might be multiplied to an almost indefinite extent. Tested by them, the matters set up can have no operation by way of estoppel. Fremont's claim, under the Alvarado grant, was to no specific tract. It was only an interest to a specified quantity, to be afterward surveyed and laid off by the officers of government. Fremont evidently thought otherwise. He believed he could himself make the segregation. He therefore made the survey in 1849, which he annexed to his petition. He asserted his claim to that specific tract. The board affirmed his claim to that tract, and it would appear a subsequent survey in 1852 was made under its decree, in conformity with it. Had the matter there rested, the present case would never have existed. But the decree of the board was reversed by the district court, and with the decree, the survey under it fell, as a matter of

course. Fremont sought a reversal of that decree in the Supreme Court, and obtained its reversal, but that reversal was accompanied with a direction that the survey should be made in a particular form. The district court entered in June, 1855, a final decree in pursuance of that direction. The only authoritative and official survey was made under that decree. That survey gave precision to Fremont's claim, and attached his title to the land it embraced. That survey covers the premises in controversy, and from its approval Fremont has asserted his right to them. From that approval his title to the land became perfect. The previous representations and disclaimers were clearly made under a misapprehension of his rights. It would be most unreasonable to hold that he intended to abandon all title to any land outside of his own private survey, or the survey under the decree of the board, provided the government should finally locate his claim on another and different portion within the exterior boundaries of his general tract.

The representations—under the circumstances, and the law governing the location of land claims under floating Mexican grants—could not be more than an expression of an opinion as to what ought to be its location, or the expression of a desire where it should be located. The defendant knew that the claim was a floating one—it is so averred to be in the answer—and evidently labored under the same mistake as to the right of the claimant to make the location as Fremont. The law was as well known to the company as to him; and both must be presumed to have known it, although, in fact, both were equally mistaken in its rule. To give the declarations and disclaimers made under these circumstances, the effect of an estoppel, operating, as it would, to deprive Fremont of his estate in the premises, and transfer it to the defendant, would be, in the highest degree, inequitable and unjust. There is no proof of any intention to deceive, nor of any facts from which such an intention can be justly inferred. The court passed upon the question and found against the charge, and thus swept out the only basis upon which it could rest. The defendant has no title to the land; that vested absolutely in Fremont by the final decree and approved survey, evidenced, as they are, by the patent under the signature of the president of the United States. Whether, notwithstanding the title to the land is in

Fremont, the defendant has a right to its use and occupation as a mining corporation, for the purpose of extracting the precious metals, is another question which we shall hereafter consider. To the land, the company has no title; it does not claim under the pre-emption laws of the United States, and if it did, the claim would be untenable, as mineral land is expressly exempted from pre-emption by the legislation of Congress.

But there is another and perfect answer to the application of the doctrine of estoppel in this case. The ground of complaint is, that Fremont represented that the premises were public land—not covered by his claim—and thus induced the defendant to enter upon the same and occupy and improve them as such. Suppose this were so—and that the land was public—no prohibition existed against a subsequent acquisition of the title from the superior proprietor. The defendant could not acquire by mere occupation—we speak now of the land, not the mineral—any rights which could control the action of the government. It could only hold so long as the superior proprietor permitted; and if that proprietor saw proper to give the land to Fremont, or to any other person, it could interpose no valid objection. The government could not be estopped from asserting its title and disposing of it, to whomsoever and whenever it thought proper. The pre-emption laws not extending to mineral lands, the defendant was at best but a mere tenant at sufferance.

By the patent the government is estopped from asserting title to the premises, and if the position of counsel were tenable, Fremont is estopped from asserting title against the defendant. It would follow that the defendant would have—by merely occupying the land as public land—rights superior to both, and that, too, in the face of an express prohibition of the sale by the government of the mineral lands. It requires no argument to show the groundlessness of the position.

We pass to the consideration of the last ground of defense—the right of the defendant as a mining corporation to the possession and use of the land for the purpose of extracting the precious metals. If it possess such a right against the true owner, it must be upon the ground that the mineral does not pass with the soil as an incident to it, but belongs either to

the United States or to the State of California, and that the defendant has an effectual license to enter upon the premises and extract the same.

In *Hicks v. Bell*, 3 Cal. 219, this court held, that the mines of gold and silver belong to the State by virtue of her sovereignty. On the other hand, in this very case which we are now considering, Mr. Justice Burnett expressed the opinion that they belong to the United States by their succession to the rights of Mexico. And in the argument upon the rehearing, the position taken in both of these cases was attacked by many weighty considerations. We do not propose, however, to pass definitely upon the question; it is not essential to the determination of this appeal that we should. The question is one of great magnitude and importance, and we purpose to postpone its consideration until it can be presented to a full bench. The situation of one of the justices of this court as former counsel of the respondent, necessarily excludes him from a participation in its decision in this action. We shall not, therefore, inquire whether or not the mineral passes with the soil. We shall assume with reference to its ownership the position most favorable for the defendant, that it belongs to the general government or to the State; for if the ownership is not in one or the other, the case of the defendant is closed, and the defense left without any semblance of reason.

Assuming, then, in the first place, for the purpose of this case, that the mineral belongs to the United States—has the defendant any effectual license to enter upon the premises of the plaintiff and remove it.

It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate, as applied to the action, or, rather, want of action, of the government. There is no license in the legal meaning of that term. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the general government only by Act of Congress. It carries an interest in the land, and arises only from grant. The mineral, whether a distinct possession or otherwise, constitutes part of

the realty, as much so as growing timber, and no interest in it can pass, except in the ordinary modes for the disposition of land. It is under the exclusive control of Congress, equally with any other interest which the government possesses in land. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is, that the government has forbore to exercise its rights, but this forbearance confers no positive right upon the miner, which would avail as a protection against the assertion of its claims to the mineral. The supposed license from the general government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact, and unwarranted in law.

It may be, and undoubtedly is, a very convenient rule, in determining controversies between parties on the public lands where neither can have absolute rights, to presume a grant, from the government, of mines, water-privileges, and the like, to the first appropriator; but such a presumption can have no place, for consideration against the superior proprietor. Presumptions are indulged to supply the absence of facts, but never against ascertained and established facts. That there has been no grant from the government is certain, for its records and legislation are public and open to examination, and its forbearance as to the public lands would not, as we have observed, avail against the assertion of its claims, much less confer rights capable of enforcement in reference to other lands.

But even if this forbearance were entitled to the slightest consideration as a *legal* objection to the assertion of the title of the government, which we do not admit, it could only be so in those cases where it has been accompanied with such knowledge, on its part, of the working of the mines and the removal of the mineral, as to have induced investigation and action, had this been intended or desired. Such knowledge must be *affirmatively* shown by those who assert a license from forbearance. This knowledge may be affirmed with reason as to mines on the public lands; but it is not shown—nor can it be—that

the government ever knew that parties claimed, under its permission and authority, to enter upon private land held by title paramount to its own, and to extract and remove the mineral. Nor do we admit that the United States—holding, as they do, with reference to the public property in the mineral, only the position of a private proprietor, with the exception of exemption from State taxation, having no municipal sovereignty or right of eminent domain within the limits of the State—could, in derogation of the rights of the local sovereign to govern the relations of the citizens of the State, and to prescribe the rules of property and its mode of disposition, and its tenure—enter upon, or authorize an entry upon, private property for the purpose of extracting such minerals imbedded in the soil, which could only be done by lessening or destroying the value of the inheritance. The United States, like any other proprietor, can only exercise their rights to the mineral on private property, in subordination to such rules and regulations as the local sovereign may prescribe. Until such rules and regulations are established, the landed proprietor may successfully resist, in the courts of the State, all attempts at invasion of his property, whether by the direct action of the United States, or by virtue of any pretended license under their authority. The defense resting upon such alleged license must consequently fail.

The claim of a license from the State with reference to the mines, assuming that she possesses title to the mineral, is based on her affirmative acts, and not on mere forbearance. By her legislation she has authorized the issuance of licenses to certain classes of persons; has provided for the introduction of proof of particular customs, usages, and regulations, in actions respecting mining claims; has levied taxes upon canals and ditches, constructed for the express purpose of conducting water to be used in mining for gold; and, in a great variety of instances, has expressed her recognition of a license in the miner to use whatever right she possessed. But this license very justly inferred, from the general course of her legislation, is restricted to the public lands. This has been expressly adjudged by this court in repeated instances.

In *Stoakes v. Barrett*, 5 Cal. 36, the court said: "We held in the case of *Hicks v. Bell*, that the mines of gold and silver in this State were the property of the State, and that the pol-

icy of her legislation permitted all persons to work for these metals. We did not, in that case, intend to go further than to decide the right of all citizens to dig for gold upon the *public lands*; for although the State is the owner of the gold and silver found in the lands of private individuals as well as the public lands, *yet to authorize an invasion of private property, in order to enjoy a public franchise, would require more specific legislation than any yet resorted to.*"

In *Tartar v. The Spring Creek Co.*, 5 Cal. 396, the court said: "The current of decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner.

"In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes, and others of like character.

"This policy has been extended equally to all pursuits and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner, where gold is discovered in his land. *This exceptional privilege is, of course, confined to public lands*, as we held in *Stoakes v. Barrett*, at the last January term;" and after referring to some previous decisions, the court observed that: "It results from the consideration we have given the case, *that the right to mine for the precious metals can only be exercised upon public lands*; that although it carries with it the incidents to the right, such as the use of wood and water, *those incidents must also be of the public domain, in like manner as the lands*; that a prior appropriation of either to steady individual purpose establishes a *quasi* private proprietorship, which entitles the holder to be protected in its quiet enjoyment against all the world but the true owner, except in the single case provided to the contrary by the statute which I have already adverted to."

In *Fitzgerald v. Urton*, 5 Cal. 309, the court said: "The legislature of our State, in the wise exercise of its discretion,

has seen proper to foster and protect the mining interests as paramount to all others. In permitting miners, however, to go upon the public lands occupied by others, it has legalized what would otherwise have been a trespass, and the act can not be extended by implication to a class of cases not specially provided for."

But it is contended by the learned counsel of the defendant that these decisions, in limiting the license to the mines on the public lands, proceeded upon a misapprehension of the legislation of the State. We do not think so. The first statute respecting the mines was passed in 1850, and provides for the issuing of licenses to foreign miners. There is nothing in that act restricting in express terms the license to the mine to the public lands, but such must evidently have been the intention of the legislature, as by the 14th section, it is provided that it shall be the duty of the governor, so soon as he shall be officially informed of the passage of a law by Congress assuming the control of the mines of the State, to issue his proclamation requiring all collectors of licenses to foreign miners to stop the issuance of licenses. The legislation anticipated manifestly had reference to the public lands. *Ses. Laws of 1850, Ch. 97.* In the following year the law was repealed, and, in the same year, the Practice Act was passed, the 621st section of which provides that "in actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations, established and in force at the bar or diggings, embracing such claim, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action." In 1852, the act in relation to possessory actions was passed. That act authorized suits by settlers on the public lands, for the purposes of cultivation or grazing, to maintain actions for interference with, or injuries done to, their possessions, with a proviso that if the land thus occupied include mines of the precious metals, the possession should not preclude entry upon the same as fully and unreservedly as it might have been made but for the possession.

There are other acts of a similar character, but we do not see anything in them which directly asserts a right to mines on private lands. The first act relating to mining licenses re-

fers, as we have seen, to the public lands. The subsequent acts relating to such licenses do not contain the provision of the first, but in their passage the legislature only adopted a municipal regulation to govern the conduct of a certain class of persons, for the purpose of raising revenue from them, and did not undertake to dispose of any proprietary interest which she may have possessed in the mines. The Possessory Act applies only to public lands, and the provision as to the introduction of customs and usages in suits for mining, determines nothing beyond the admissibility of certain kinds of evidence.

The premises in controversy in the present case being private property, it follows that there is no pretense for the justification of the defense of a license from either the general or the State government. If the mineral belong to either government, there must be, as held in *Stoakes v. Barrett*, more specific legislation than any yet resorted to, before the invasion of private property can be permitted in search of it or for its extraction. What that specific legislation should be in such case, it is unnecessary to determine. It is but reasonable to say that it should embody provisions for the protection of the rights of the landed proprietor, and furnish ample indemnity against the damage arising from the injury to his possession.

The doctrine of an unlimited general license—put forth in many instances, and advocated by the defense—is pregnant with the most pernicious consequences. If upheld, it must lead to the spoliation of landed estates, under the pretense of mining, without possibility of protection or redress on the part of the owner. There is gold in limited quantities scattered through large and valuable districts, where the land is held in private proprietorship, and under this pretended license the whole might be invaded, and for all useful purposes, destroyed, no matter how little remunerative the product of the mining. The entry might be made at all seasons, whether the land was under cultivation or not, and without reference to its condition, whether covered with orchards, vineyards, gardens, or otherwise. Under such a state of things, the proprietor would never be secure in his possessions, and without security there would be but little development, for the incentive to improvement would be wanting. What value would

there be to a title in one man, with a right of invasion in the whole world? And what property would the owner possess in mineral land—the same being in fact to him poor and valueless just in proportion to the actual richness and abundance of its products?

There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or if existing, that he wishes to extract and remove it.

We have thus gone over all the grounds taken by the defendant, and in none of them do we find any valid objection to the recovery of the plaintiff. In passing upon the case, we have extended the greatest indulgence to the defendant. We have considered matters not brought in issue by the pleadings, and which, because not presented by any written allegations, were not entitled to notice. We have done so, partly, because argument was allowed upon them before the court without objection, but, principally, because we have hoped to thus put at rest forever the controversy between these parties. We do not intend, however, to allow this indulgence to be drawn into a precedent for permitting the loose practice thus adopted. If parties consent that defenses, other than those alleged in their answers, may be set up, they must be presented by regular written allegations, in a properly traversable form, or we shall not regard them.

Judgment affirmed.

BALDWIN, J., having been counsel for the respondent did not sit in the case.

AH HE V. CRIPPEN.

(19 California 492. Supreme Court, 1861.)

Foreign miners' tax. The Revenue Act of 1860, which declares that no person who is not a citizen of the United States, or who has not previously declared his intention to become such, shall be allowed "to take gold from the mines of this State," without a license: *Held* to refer only to public lands of the State or United States, and not to the private property of individuals.

Mexican grant confirmed by U. S. patent carries the minerals. The title to the Mariposa estate is under a grant of the former Mexican Government, and a patent from the United States issued upon its confirmation. Such patent invested the patentee with the ownership of the precious metals which the land may contain. It transferred to him all the interest which the United States possessed in the soil.

Appeal from the Fifteenth District.

Replevin for a horse levied on by the defendant as tax collector of Mariposa county, to enforce the collection of the foreign miners' license of four dollars per month under the Revenue Act of 1860; plaintiff, who is a Chinaman, but a *bona fide* resident of the State, having refused to pay such license.

Judgment for plaintiff. Defendant appeals.

THOS. H. WILLIAMS, attorney-general, for appellant.

C. T. BOTTS, for respondent.

FIELD, C. J., delivered the opinion of the court, BALDWIN, J., and COPE, J., concurring.

The sixty-fourth section of the Revenue Act of 1860 declares that no person who is not a citizen of the United States, or who has not previously declared his intention to become such (California Indians excepted), shall be allowed "to take gold from the mines of this State, or hold a mining claim therein," without a license as subsequently provided by the act. The plaintiff is a Chinaman, and, of course, is not a citi

zen of the United States, or entitled to become such under any existing legislation of Congress, and was engaged in mining upon the Mariposa estate, the property of Fremont and others, under a lease from the owners. The defendant is sheriff of Mariposa county, and the property in controversy was seized by him in the enforcement of the license tax, claimed of the plaintiff under the section in question. The point for determination is, whether the section refers to mines contained in lands which are the private property of individuals, as well as to those in the public lands of the State, or of the United States. We are clearly of the opinion that it refers only to mines in the public lands. The owners of the Mariposa estate derive their title under a grant of the former Mexican Government and a patent from the United States issued upon its confirmation. That patent invested the patentee with the ownership of the precious metals which the land may contain. It transferred to him all interests which the United States possessed in the soil, and everything imbedded in or connected therewith. *Moore v. Smaw*, and *Fremont v. Flower*, 17 Cal. 200.

By force of this instrument, therefore, the owners possess whatever "mining claims" exist upon the estate, and their rights in that respect can neither be enlarged nor diminished by any license from the State. They hold such claims independent of the section in question, and may extract the gold themselves, or allow others to extract it, upon such terms as they may judge most advantageous to their interests.

Our conclusion as to the limitation which the general language of the section must receive, is strengthened by a consideration that a like limitation has uniformly been applied to language equally comprehensive in previous statutes. For example: the Act of 1850, "for the better regulation of the mines, and the government of foreign miners," in its first section declares that "no person who is not a native or natural born citizen of the United States, or who may not have become a citizen under the treaty of Guadalupe Hidalgo, (all native Californian Indians excepted) shall be permitted to *mine in any part of the State* without having first obtained a license" according to the provisions of the act. Yet, that the legislature must have intended the prohibition against mining without a

license, to apply only to mining on the public lands, notwithstanding the broad terms used, is evident from the fourteenth section of the same act. By that section, it is made the duty of the governor, so soon as he shall be officially informed of the passage of a law by Congress assuming the control of the mines of the State, to issue his proclamation requiring all collectors of licenses to foreign miners to stop the issuing of licenses. The legislation thus anticipated plainly referred to the public lands which were subject to the disposition and control of Congress.

Judgment affirmed.

1. A Spanish grant of lead mines in Missouri, construed: *Wilson v. Smith*, 5 Yerger (Tenn.) 379.

2. By the Partidas, mines were so vested in the king that they were held not to pass in a grant of the land, although not, in terms, excepted: *Chouteau v. Molony*, 16 How. 220.

3. Lead mines are not excepted in the act of May 26, 1824, as to confirmation of French and Spanish titles: *Delassus v. U. S.*, 9 Pet. 117.

4. A United States patent in confirmation of a Mexican grant invests the patentee with the ownership of the precious metals contained in the land: *Fremont v. Flower*, 17 Cal. 199; *Post PUBLIC DOMAIN*.

5. The discovery of gold or silver, under the mining laws of Mexico, did not destroy the title of the individual holding a grant of the land: *Fremont v. U. S.*, 17 How. 565.

6. Validity of the proceedings to confirm the Mexican grant of the rancho containing the new Idria quicksilver mine: *McGarrahan v. New Idria M. Co.*, 49 Cal. 331, 96 U. S. 317; *Post PATENT*.

7. The mode of acquiring titles to mines in Mexico and the mode of registry considered: *U. S. v. Castellero*, 2 Black, 17.

8. Segregation out of the grant of a mine conveyed by indefinite description: *Santa Clara Ass'n v. Quicksilver Co.*, 17 Fed. 657.

9. The term "mining claim" can not include a "mine" opened on a Mexican grant: *Williams v. Santa Clara Co.*, 4 W. C. R. 616.

ROBINSON ET AL., Respondents, v. THE IMPERIAL SILVER MINING Co., Appellant.

(5 Nevada, 44. Supreme Court, 1869.)

¹ **Insufficient location of water right.** Posting notice on a tree on the river-bank, claiming a location of a water right at that point, and of right of way for a ditch of a certain capacity from that point to a bend of the river below, followed within six months by fifteen or twenty days' work on the ditch, but not sufficient to make it of any practical use, and accompanied by a monument of stones at a point below the bend suitable for a mill site, after which nothing was done for the next three months: *Held*, not sufficient to constitute possession nor prevent location by a stranger.

Possession sufficient to support ejectment on public land. The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation—a subjection to the will and control—a *pedis possessio*. The mere assertion of title, casual acts of ownership or improvement, or the bare marking of boundaries, have never been held a valid possession after the lapse of sufficient time to complete the location or appropriation.

Location of mill site, not incident to ditch location. A notice of appropriation of a right of way for a water ditch is not a notice of the appropriation of the land upon the sides of it, nor of a mill site in connection with it.

Appropriation of water. The location of a mill site is not an appropriation of water for purposes of the mill site.

Deed by appropriators of town site. A corporation had a tract of land surveyed for a town site which embraced certain land claimed by B. and E., to whom the corporation relinquished the conflicting area: *Held*, in a controversy relating to the tract claimed by B. and E., that a deed from the corporation for such tract conveyed no title, (1) because it never claimed it, and (2) because it never made such improvements on the tract as to constitute possession.

² **Completion of location prevented by force.** A party attempting to locate a claim, and being engaged in fencing it, was driven off by force: *Held*, that having complied with the law as far as he could, he had acquired a good possessory title against all persons, and although the fence he had commenced was not of the proper character, it would be presumed that an inclosure in all respects sufficient would have been completed.

A wrong-doer is not permitted to profit by his own wrong.

Acts of employe of surveyor certified as official. A statute requiring surveys for purposes of settlement to be made by the county surveyor

¹ *Erhardt v. Boaro*, 113 U. S. 528; *Holland v. Mt. Auburn Co.*, 9 M. R. 497.

² *Erhardt v. Boaro*, 4 M. R. 434; *Miller v. Taylor*, 9 M. R. 547.

is sufficiently complied with if made by a person in his employ and certified as his official act.

Statute of Limitations—Foreign corporation. A foreign mining corporation cannot plead the Statute of Limitations in Nevada.

Construction of Nevada Limitation Act. Section 21 of the Statute of Limitations, in the expression "cause of action," includes real as well as personal actions.

No reversal for error where judgment clearly right. A verdict which is undoubtedly right upon the evidence, that is, so clearly right that if it were the other way it would be considered contrary to the evidence, should not be set aside because of the admission of improper evidence or the giving of incorrect instructions.

Appeal from the District Court of the Fourth Judicial District, Lyon County.

The facts are stated in the opinion.

WILLIAM & BIXLER, for appellant.

MESICK & SEELY, for respondents.

LEWIS, C. J., delivered the opinion of the court.

In the month of September, A. D. 1859, one W. R. Johnson entered upon a tract of unoccupied land, lying on the Carson river, in the county of Lyon; erected some kind of a cabin on the premises; placed a notice on a tree on the bank of the river, in which it was stated that he claimed a certain quantity of land, and also the water of the river; and on the twenty-third day of the next month he had a description of his land, with a notice that he claimed the same, recorded in the office of the county recorder. In addition to this he built a temporary dam across the river, within the boundaries of the land thus claimed by him. Shortly after—that is in November or December—he left the premises and went to California, as it was reported, for his family, intending to bring them to this State. In a few weeks after reaching California he wrote to one Holmes, who was living near his claim, requesting him to do some work on it for him, without specifying what he wished done—his object, however, evidently being to have work done to indicate his intention to continue his claim to the land and water privilege.

But the persons from whom the defendant derives title, and who were then making some claim to the premises, being in-

formed of this letter, forbade Holmes doing any work for Johnson—and none was done. Whether Holmes was deterred from complying with Johnson's request by reason of the threats of those persons or not, or whether he ever had any intention of doing anything, is not clearly shown by the record; nor in the view which we take of this very case is it of any consequence. Nothing further appears to have been done by Johnson to perfect his claim thus begun; but what he acquired, if anything, was subsequently conveyed to one DeGroot, who afterward secured a title to the premises here in dispute, by means of a survey made in accordance with statute. We have concluded to treat the acts of Johnson, and the conveyance by him to DeGroot, as amounting to nothing, and as giving the latter no right whatever—and so to let the plaintiff's title rest entirely upon the acts of DeGroot. Thus, it will not be necessary to refer further to the acts of Johnson, or to determine what rights, if any, he acquired by means of the few acts done by him. He and his title may therefore be finally dismissed from further consideration in this case.

On the third day of December, whilst he was in California, two persons, Black and Eastman, took steps to acquire a water privilege, or a right to divert a certain quantity of water from the Carson river, through a ditch to be dug across the land claimed by Johnson. As one of the titles relied on by the defendants is derived from these two persons, and as their right or title was based entirely upon occupation or actual possession, it will be necessary to ascertain whether they had such actual possession or occupation of the premises in dispute, at the time the grantor of the plaintiff entered and secured a title by means of his survey. If the acts done by Black and Eastman, prior to this survey, were such as to give them actual possession of the land here claimed by the plaintiff, then it must be conceded that the defendant has the better title, and is entitled to recover.

The first act done by Black and Eastman was to post a notice on a tree standing on the bank of the river, which was in this language: "Notice is hereby given that we, the undersigned, have this day located a water right, commencing at or near this notice; also a right of way for a ditch of sufficient capacity to carry two thousand inches of water; and the same

amount of water—that is, ‘two thousand inches,’ is claimed to fill a ditch of the aforesaid capacity. Said water to be carried in said ditch to the first rocky bend with high banks, about one fourth of a mile down the river from this notice. Said water and ditch right was located by the undersigned on the third day of December, A. D. 1859. The undersigned intend to prosecute said work as soon as spring opens.” This notice was signed by Black and Eastman. The valuable portion of the premises—that is, the mill site, is situated below the point here specified as the terminus of the contemplated ditch, and where it was in fact terminated—the mill site being at the lower side of the “rocky bend” mentioned in the notice, whilst the ditch terminated at the upper side. It will be observed that there is nothing said in this notice about a claim to land, except a right of way for a ditch. In accordance with this claim, and the intention expressed in the notice, Black and Eastman immediately commenced to construct the ditch—working, however, only on occasional days upon it, so that up to about the fifteenth of May, A. D. 1860—six months after the notice was posted, and at the time when the last work was done by them—only about fifteen or twenty days’ work had been done; Black testifying that all the work done upon the ditch, up to that time, could have been done by one man in five or six days, whilst Eastman testifies that fifteen or twenty days’ work had been done upon it. However that may be, nothing was done by them but the digging of an irregular ditch, running between the point where the notice was posted and the rocky bend—a point just above the defendant’s mill site. As there was nothing in the notice indicating an intention to claim any land for any purpose whatever, so we are perfectly satisfied, from the testimony, that nothing was done at the time toward appropriating any, except in the digging of the ditch. Eastman, who was a witness for the defendant, testified that he thought they claimed some land; but what quantity, or where it was located, seems to have utterly escaped his recollection. The defendant can hardly expect to derive much advantage from a claim, the locality of which can not be determined by the locators themselves. But Black and Eastman both testify that they intended at some time or other to build a mill; and that the water was claimed and the ditch dug with

that object in view; and it is claimed by defendants that it was the intention to erect the mill upon the site now occupied by it; that a monument of stones was placed by Black and Eastman at that point. The evidence, however, does not show when the stones were placed upon the ground—whether before or after DeGroot's survey, and it can not be presumed that it was before. Admitting, however, that Black and Eastman intended to claim the premises in dispute, and that the monument of stones was placed there by them prior to DeGroot's claim, still it can not be held that a few stones thrown together would give a person actual possession of a tract of land as large as that claimed here, or indeed of any quantity whatever. It must be borne in mind, that the digging of this irregular ditch, of which no use whatever had been made, or attempted to be made, and through which no water had ever run, except during the season of high water in the river, and the piling of a few stones together at some distance below the lower end of it, is all that had been done by Black and Eastman when DeGroot entered and made his claim. And all this, except perhaps throwing up the monument of stones, was done by the middle of May; and everything remained in that condition, with nothing further being done until the twentieth of October, when DeGroot's survey was made. Black and Eastman were not living on the premises, nor had they any definite purpose with respect to the use of the ditch, or as to when, if ever, they would make use of it. Eastman says that the object in doing what work was done, was to show that they had a claim; that they intended some time or other to build a mill, and so make use of the ditch. Were these acts—that is, the digging of the ditch, and the piling up of the monument of stones—sufficient, under the law, to give Black and Eastman actual possession of the land here claimed? This question involves the entire merits of the case.

We admit that the argument of counsel for appellant against the validity of Johnson's claim is perfectly satisfactory, but the same argument and the same authorities relied on apply with equal force to the title of Black and Eastman, and to our mind, as completely overthrow and destroy it.

What acts of dominion over public land will, independent of statutory regulations, be sufficient to give a right of pos-

session as against one subsequently entering, or rather, what character of possession of public land is necessary to be shown to enable a claimant relying solely upon possession to recover in ejectment, has, perhaps, more than any other question, received the attention of the courts of California and this State; and it may be safely said that it has been uniformly held by them that the possession must be an actual occupation, a complete subjugation to the will and control, a *pedis possessio*. The mere assertion of title, the casual or occasional doing of some act upon the premises, or the bare marking of boundaries, have never been held sufficient, after the lapse of a sufficient time to enable the claimant to make such inclosures or improvements as may be necessary to give him actual possession. We held in the case of *Staininger v. Andrews*, 4 Nev. 59, that while a person claiming public land was diligently prosecuting such work as might be necessary to subject it to his dominion or control, he should be deemed in the actual possession as against all persons entering within his marked boundaries and ousting him. Except in such cases, the courts have uniformly held that nothing but prior actual occupation or possession will be sufficient to authorize a recovery in ejectment, when possession alone is relied on. Thus, in *Murphy v.*

Wallingford, 6 Cal. 648, it is said: "Possession is presumptive evidence of title, but it must be an actual *bona fide* occupation, a *pedis possessio*, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership. A mere entry without color of title, accompanied by a survey and marking of boundaries, is not sufficient." So in *Garrison v. Sampson*, 15 Cal. 93, Mr. Justice Baldwin, speaking for the court, reiterates the rule in this manner: "The land is public land. It was not taken up by the plaintiff under the possessory act of this State, nor was it inclosed. There were a house and a corral on it. Of these he may be said to have been in the actual occupancy. But we can not see from the proof any right of possession to the whole of the quarter section, or even any claim to it. We do not understand that the mere fact that a man enters upon a portion of the public land and builds or occupies a house or corral on a small portion of it, gives him any claim to the whole subdivision, even as against one entering

upon it without title." Again, in *Coryell v. Cuin*, 16 Cal. 573, it is said: "And with the public lands which are not mineral lands, the title as between citizens of the State, where neither connects himself with the government, is considered as vested in the first possessor and to proceed from him. This possession must be actual and not constructive, and the right it confers must be distinguished from the right given by the possessory act of the State. That act, which applies only to lands occupied for cultivation or grazing, authorizes actions for interference with or injuries to the possession of a claim, not exceeding one hundred and sixty acres in extent, where certain steps are taken for the assertion of the claim and to indicate its boundaries. Parties relying upon the rights conferred by this act must show a compliance with its provisions. They can thus maintain their action without showing an actual inclosure or actual possession of the whole claim. But when reliance is placed, not upon this act but upon possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." See, also, the cases referred to in *Staininger v. Andrews*, *supra*. Indeed, that the possession, when that alone is relied on, must be actual and complete is an expression stereotyped in all cases where this question is discussed, and each succeeding case only serves to strengthen and illustrate the rule. This question has been repeatedly submitted to, and considered by this court, and it seems impossible to define the requirements of the law, or specify with more clearness or precision the elements of a good possessory title than has already been done in the decision above referred to.

Tested by the rule announced and exemplified in these cases, had Black and Eastman the actual possession of the premises in dispute at the time DeGroot entered? Most certainly they had not. Here was nothing done for a period of eleven months but the digging of an irregular and utterly useless ditch in a boundless waste of unclaimed lands; apparently

without a purpose, never used; dug, not with a view to immediate use, but only, as the parties themselves testify, to show that they claimed a water privilege, and only diverting water from the river during the season of high water; with nothing but a small monument of stones at some distance from it to indicate an intention to claim any land. In this condition everything remained for a period of five months without a solitary act being done, and probably the parties themselves not having placed foot upon the soil here claimed during that period, when the grantors of the plaintiff entered. The ditch was certainly not dug for the purpose of marking the boundaries to any claim of land, nor to indicate that an appropriation of any was intended by the parties. It was unquestionably dug simply for the purpose of diverting water from the river; where or how it was to be used is not stated in the notice; and it will also be observed that no land, but only a "right of way" for the ditch, is claimed. The land upon each side of the ditch could, without the least conflict with the intention of Black and Eastman, as expressed in their notice, have been appropriated by others. This ditch, then, should be considered simply as an act performed for the purpose of appropriating water, and as such was its immediate purpose, it should give the persons digging it no other right. An act by which water alone is appropriated, should not be considered an act for the appropriation of land. Land is appropriated by one character of acts, water by another.

It would be as absurd to say that the digging of a ditch is an appropriation of land sufficient for a mill site, as to say that to appropriate a mill site would be an appropriation of water for milling purposes. It would hardly be claimed, if Black and Eastman had simply appropriated a mill site, that they could by such appropriation claim also that they had appropriated such quantity of water as they might need for milling purposes. What good reason is there for claiming that the digging of a ditch for the purpose of diverting water from the river was an appropriation of a mill site? The ditch, if completed within a reasonable time, might have given a right to divert the water as against subsequent claimants—it could give nothing more. This is all that was claimed in the notice, and all that seems to have been attempted to be secured. Admit-

ting, however, all that can be claimed for this ditch, that its immediate purpose was to secure the possession and control of the tract of land here claimed, still it would be impossible under the decisions, to hold that Black and Eastman were in actual possession or occupation of it when DeGroot entered. No person going upon the premises could by the most diligent search have ascertained what was claimed. No boundaries were marked, no improvements were to be seen, no use whatever was being made of the land, nor any indication that there was any intention ever to do so. Did a few stones thrown together place these persons in actual possession of a tract of land nine hundred feet in length by seven hundred feet in width? If so, why might they not, by the same monument, claim an indefinite quantity? Their claim was bounded only by their desires or necessities. We can see no more reason why such a monument, with a ditch not on the premises, should give actual possession of a mill site, than of hundred and sixty acres of land. We conclude that in October, when DeGroot entered, Black and Eastman were not in the actual possession of the premises here claimed, and therefore that the land was vacant and subject to appropriation. But the defendant also relies upon a title acquired from a company called the Mineral Rapids Company, which, it is claimed, located this land in February, A. D. 1860, some months prior to the DeGroot survey. This company, however, does not appear to have conveyed any land to the defendant. It claimed the right to use and divert the water of Carson river between certain points, as will be seen by the following notice, which was the foundation of the right here conveyed :

“ Know all men by these presents, that we, the undersigned, claim all the water in Carson river embraced and being within the boundaries hereinafter described, to wit: Commencing at a point three hundred and sixty-four rods north of Keller's log house in Chinatown, by one hundred and twenty-six rods east; said point being on the north line of a tract of land located and surveyed by J. R. Sears and others; following said river up and embracing all the water in said river to a point known as Logan & Holmes' quartz mill, for the purposes and use of machinery or ditches, or for any other uses which we, the claimants, may choose.”

The deed from the company to the defendant conveys all the water right and privilege located as above. This deed may have conveyed whatever right the Mineral Rapids Company may have acquired to the water of the Carson river, but we are unable to see how it conveyed the premises here in dispute. No land is described, nor does it appear to have been the intention to convey any. It is simply a deed of a water right and nothing more. But should it be conceded that it was the intention to convey this land, that it is included in the deed, then, we answer, the Mineral Rapids Company never acquired any right or possession whatever of it, and hence could convey no title.

It appears that at the time mentioned the company had a private survey made of a tract of land for a town site, which embraced the premises here claimed. But it is admitted that the company, knowing of Black and Eastman's claim, did not intend to interfere with their rights, nor make any claim adverse to them, and so relinquished all right to that portion of the land claimed in this action. In fact, they never claimed to be in possession of, or have any title to it. The balance of the survey tract was subdivided into lots, but this portion of it was not so plotted on the map, or subdivided as a part of the town site. All the evidence shows that the Mineral Rapids Company made no claim to this tract. Not intending to claim it, and having made no improvements thereon, it can hardly be said that any title was acquired. Even if it was intended to make such claim, still the same objection may be urged to its title that is urged against Black and Eastman's—there was no actual possession of it. If it were possible for this company to acquire title to land which it did not intend to claim, still something more than intention was necessary to give it such title, or to place it in the actual possession of it against a subsequent claimant. As this portion of their survey was not subdivided, nor intended as a portion of the town site, it was certainly as necessary to inclose it and to make some use of it, as in any case. Without intending to be understood as holding that that portion of the land which was intended to be taken up for a town site should have been fenced, it was certainly necessary to inclose or make some appropriate improvements upon that portion of the land within the survey

which was not intended for a town site. The subdividing, staking off, and sale of lots might possibly be deemed sufficient acts of dominion to constitute actual possession of a town site but such acts could give possession of nothing beyond the limits of such acts, or the town lots themselves. With respect to the tract of land here claimed nothing was done by the company but to survey the outer lines. It remained in this condition, with no act of ownership exercised over it, from February to the time of DeGroot's entry, a period of about eight months. The survey made by this company, it must be borne in mind, was not in accordance with the Utah statutes, and had none of the elements of an official survey. Whatever may have been its right with respect to the town lots, it is clear beyond all question that the company had not the actual possession or occupation of this land: first, because it never claimed it, and, second, if it did it made no such improvements upon or inclosures of it as to give it the actual possession at the time of DeGroot's entry. The deed from it to the defendant, therefore, conveyed no right to the land here in controversy.

Whilst the land was thus unoccupied, with no visible evidence of any claim being made to it, except an irregular ditch and a small monument of stones, DeGroot, the grantor of the plaintiff, entered upon it, and in compliance with the statute law then in force, had it surveyed by the county surveyor; had the survey recorded, and obtained from the surveyor a certificate of that fact. The law authorizing such survey provided that "the county surveyor shall within thirty days after completing any survey make true copies or diagrams of the same, and transmit the same to the surveyor-general, and one to the county recorder, and give a certificate of such survey to the person for whom it was made, describing the tract, block, or lot, and number of acres contained, and such certificate shall be title of possession in the person or persons holding the same."

The statute further declared that "one year shall be allowed to persons having land surveyed to inclose and fence the same, and on their failing to inclose said land within one year, their title to said land shall be nullified, and the land be common, and may be surveyed to any person applying for the same."

From these two sections, composed with but little regard for the rules of English grammar, it will be seen that a certificate of an official survey was made "title of possession" for one year; that the person having such certificate was to be deemed in possession of the surveyed premises for one year, but not beyond that. After the expiration of the year the land could only be held by means of an inclosure. DeGroot obtained a certificate from the county surveyor, in accordance with this act, on the twenty-first of October, A. D. 1860, and within one year began to fence the land as required by the latter section above quoted. But whilst so engaged he was forcibly stopped by Black and Eastman, and himself and employes driven from the premises. For this reason the fence was never completed. Thus, by a compliance with the law, so far as he could or was permitted, DeGroot acquired a title which entitled him to the possession of the land in dispute, as against all persons except the general government. It is argued, however, against this title, that the survey was not actually made by the county surveyor, but by persons employed by him and acting under his directions. We see no merit in this proposition. It is true, the county surveyor did not perform the manual labor of making the survey, nor could that have been expected of him by the legislature. It was made under his supervision and direction, and he gave the proper certificate which under the statute constituted the title. It was an official act in all its essential features. When duties of this kind are required to be performed by an officer, it is not expected that the labor is entirely to be performed by him. If it be adopted by the officer as his act, and certified to by him as such, the law is virtually complied with. Another objection made to this DeGroot claim is that although he commenced to fence the land within the year, yet the fence which he commenced to build, even if completed, would not have been sufficient to give him actual possession of the premises. Counsel seem to think that Black and Eastman and the Mineral Rapids Company could have an actual possession, and be deemed in the occupation of the land without any inclosure whatever, or even marking the boundaries, but that the grantor of the plaintiff could not secure such possession even by complete inclosure. We can hardly think that

counsel rely upon this point with much confidence in its merit. DeGroot had under the statute one full year after the survey to inclose his claim. He began in good faith to comply with its requirements, but was forcibly prevented by the grantors of the defendant. It can not be presumed in favor of those who by violence stopped the fencing, that it would not have been sufficient to answer all purposes. The presumption, if any can be indulged in, is that an inclosure in all respects sufficient would have been completed. If it were admitted that the fence, as it was being built, would not have been sufficient, still how is it to be known that if DeGroot had not been interfered with he would not, before the expiration of the year, have made it complete and of the proper height? The grantors of the defendant having ousted DeGroot before the expiration of the time limited for him to make an inclosure, can not now be allowed to derive any advantage from his failure to comply with the law in this respect; nor is the defendant, who is their grantee, in any better position. The law permits no person to profit by his own wrong. So far as this case is concerned, then, the DeGroot title must be considered as good as if he had inclosed his land with a sufficient fence within the time limited by law: *Alford v. Dewin*, 1 Nev. 207. He has therefore the better title; and as the plaintiff claims from him we see no reason thus far why he should not recover.

The next question discussed in this case is that raised upon the Statute of Limitations, the defendant pleading an adverse possession in itself for over five years. But we are satisfied this defense is entirely unavailing to the defendant, it being a foreign corporation, and hence not entitled to plead the statute. It having no existence within this State, and the courts not having complete jurisdiction over it, it is brought within the provisions of section twenty-one of the statute, which declares: "If, when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State; and if after the cause of action shall have accrued he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action." That foreign corporations, which may never have had a legal existence

within the State, are included within exceptions or statutes of this kind, is a question now very firmly settled by the authorities. Thus, in the case of *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210, the Court of Appeals, upon a very thorough consideration of the question, and full examination of authorities, came to the conclusion that a foreign corporation came within the provisions of a statute similar to ours, and hence could not avail itself of the bar of the statute. The court concluded the discussion of the question in this language, every word of which is pertinent in this case: "The course of adjudications, established by these cases, authorizes us, I think, to carry out the obvious intention of the legislature in the statute before us. We can see no motive which it could have had for discriminating in favor of a foreign corporation, or any indication of an intention so to discriminate. The language of the exception in the first branch of section twenty-seven is not in all respects congruous to the case of a corporation, but there is an incongruity nearly as great in applying the phrase 'returning into this State' to a person who had never resided here; and quite as great in accommodating it to the case of one who had died abroad, and who could not by any possibility return. If the consequence is that a corporation in another State or country can not enjoy the advantage of our limitation, the same is true of a natural person domiciled abroad, and where circumstances prevent his coming within our jurisdiction. The policy of our law is, that no persons, natural or artificial, who are thus circumstanced, can impute laches to their creditors, or those claiming to have rights of action against them, in not prosecuting them in the foreign jurisdiction where they reside. It was equitable and in accordance with the policy of the law of limitations, that when the reason for excusing the creditor from the use of diligence should cease by the debtor coming into the State, the obligation to use diligence should again attach. In ingrafting this policy upon the statute, the legislature made use of general words, which, though adequate to describe a corporation, did not contain any language referring specifically to a debtor who could not, by its constitution, pass from one territorial jurisdiction to another."

It is, however, argued here, that even if section twenty-one does include foreign corporations, its provisions have applica-

tion only to personal actions; that the section has no reference to and does not apply to real actions accruing within this State. It is not claimed, nor indeed can it be, that there is anything in the language of the section to authorize any such construction or limitation of its provisions. The language employed by the legislature is as broad and comprehensive with respect to the kind of actions to which the section shall apply as need be, and as clearly includes real actions as personal. If it were the intention to restrict its provisions to personal actions, it is reasonable to presume that appropriate language would have been used for that purpose. The act in which the section is found fixes the time for commencing all kinds of actions, and section twenty-one certainly appears to make an exception to the entire act. So far as the language of the section is concerned, there is no more reason for holding that it applies only to personal actions than that it applies only to real actions. But some weight is given to the position of the section in the act as favoring this proposition. It seems to us its position rather negatives any such conclusion. It is placed in position with sections that are unquestionably general in their character, evidently applying to all kinds of actions. Thus, section twenty declares, when, within the meaning of the act, an action shall be deemed commenced so as to take it out of the statute, and unquestionably applies to all actions. Section twenty-two is in express terms made applicable to personal actions, and then section twenty-three is evidently a general section, providing that when a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from the death. The section's position in the act certainly does not seem to favor the proposition of counsel for appellant.

It is true, in all cases for the recovery of the possession of land, an action might be brought against the agents by whom the possession may be held for the corporation. Such action, however, would be unavailing in determining the title or claim to the real property in interest. But even if it were, that is no reason why the courts should place a strained and unnatural conclusion upon the plain language of the legislature.

The real claimant—the foreign corporation—is not within the territorial jurisdiction of the courts of this State, although its agents may be; and this is the real reason why it has been deemed proper to provide, that when a cause of action has accrued against a person, the time of his absence from the State where the plaintiff resides shall not be computed in the period of limitation. This precise question was raised and passed upon by the Supreme Court of Indiana, in the case of *Lagow v. Neilson*, 10 Ind. 183, the court holding that a section, substantially like section twenty-one of our act, included real as well as personal actions.” “It is contended,” says the court, “that this section was intended to apply to personal actions, and not to those for the recovery of real property. We are not inclined to adopt that construction. As contended, the concluding branch of the section should not be so construed as to allow the law of limitations of a sister State to be used here in regard to actions for the realty; and it may be that for the recovery of real estate, a party is never prevented from bringing his suit by the mere residence of any claimant or owner—still these conclusions not being inconsistent with the very explicit language used in the first branch of the enactment, can not be allowed to control it. The phrase ‘shall not be competent in any of the periods of limitation,’ evidently refers to all the periods of limitations definitely fixed by the statute; hence there seems to be no room left for construction.”

Chief Justice Beatty, in the case of the *Chollar-Potosi M. Co. v. Kennedy*, 3 Nev. 361, took a different view of this question; but that case was not decided upon this question, the court not agreeing with the learned judge in the opinion entertained by him—so, that case is not authority except so far as the opinion there expressed is concerned, which is certainly entitled to great weight; but we are compelled, upon a careful consideration of the question, to come to a different conclusion. The defendant could not therefore avail itself of the statute.

It is also argued, that the court below erred in giving certain instructions at the request of the plaintiff, and in refusing to give others asked by the defendant. The second instruction given by the court, and which it is claimed is incorrect, is in this language: “Under the laws of the territory of Utah, in

force during the year 1860, the certificate of the county surveyor, of his survey of land to the person for whom it was made, describing the tract surveyed and number of acres contained, was the title of possession thereto to the person or persons holding the same for the period of one year, without making any improvements upon the land; and such right and title continued without inclosing or fencing, or otherwise improving the same as against any and all persons preventing such fencing, and their grantees and successors in interest." The objection urged to this is, that no exception is made of such lands as might be occupied at the time said survey was made; that the title given by reason of such survey could only be of land unoccupied at the time it was made. That a survey could give no title as against persons in the actual possession, when made, may be admitted, but we have shown that neither Black nor Eastman, nor the Mineral Rapids Company, were in the actual possession of the land in dispute at the time DeGroot had his survey made; that it was, in fact, vacant land; the failure, therefore, to incorporate an exception with respect to occupied land, in the instruction, could not possibly have injured the defendant. Hence the giving of the instruction was not an injury of which it can complain, as such instruction could not have misled the jury to its prejudice. However, we are satisfied that the first instruction given was incorrect; but it is also perfectly evident that the verdict is correct, and supported by the undisputed facts of the case. Had it been against the plaintiff, it would have been clearly contrary to the evidence. Such being the case, it should not be disturbed.

The rule, we think, is well settled, that a verdict which is undoubtedly right upon the evidence—that is, when so clearly right that if it were the other way it would be considered contrary to the evidence—should not be set aside because of the admission of improper evidence, or the giving of incorrect instructions: 1 Gra. & Wat. on New Trials, 301; 2 Id. 634; *Levitzky v. Canniny*, 33 Cal. 299; *Pico v. Stevens*, 18 Id. 376; *Fleeson v. Savage Co.*, 3 Nev. 157.

The judgment of the lower court is affirmed. A rehearing was denied. JOHNSON, J., did not participate in the decision.

1. The appropriation of water for all purposes stands upon an equal footing, and a later appropriation for mining purposes is not good against a prior appropriation by a mill: *McDonald v. Bear River Co.*, 1 M. R. 626.

2. Description in lien of land around a quartz mill, in these words, "with such convenient space of ground around the same as may be required for the convenient use and occupation thereof," held to be sufficient: *Tibbets v. Moore*, 9 M. R. 348.

3. The right acquired by one who appropriates the waters of a stream for milling purposes is the right to the momentum of its fall at the point of location and to the flow of the water in its natural course: *McDonald v. Askeu*, 1 M. R. 660.

SPENCER V. SCURR.

(31 Beavan, 334. The Rolls Court, 1862.)

¹ **Underlying seams constitute a single mine.** A testator had demised all the seams of coal under his estate, but only two seams were known or worked during his lifetime. After his death a new seam was discovered, which could only be worked by a new shaft. A lease being granted after testator's death, it was *held* that it was not the case of the opening of a new mine, and that the tenant for life under the will was entitled to the annual profits arising from the new seam.

The testator, Mr. Robert Spencer, was the owner of the Deanery estate in Durham, consisting of 580 acres, under which there were seams of coal and iron, of which the main seam and the five-quarter seam alone were worked.

By a lease, dated in 1831, Mr. Spencer demised to Birkbeck and Pease "all those collieries, coal mines, seam and seams of coal called the main seam and the five-quarter seam, and all other seam and seams of coal, together with all ironstone situate, lying and being within and under, and which could, should or might be had, sought, dug, won, wrought, obtained, and gotten forth and out of all the lands and grounds of him, the said Robert Spencer, known by the name of the Deanery Farms," to hold the same for a term which would expire in 1862, at a certain rent.

In 1834 Mr. Spencer made his will, by which he devised the estate upon certain trusts, under which his widow (the plaintiff) was entitled to a moiety of the "rents, issues and yearly proceeds for life, with remainder to the defendant, Mr. Henry Spencer, absolutely, and Mr. Henry Spencer was now absolutely entitled to the other moiety.

The testator died in 1836.

The only seams of coal which had been worked under the lease of 1831 were the main seam and the five-quarter seam mentioned in such lease, and lying at a depth of about fifty-four fathoms below the surface ground. In 1846 it was discovered, from the workings in an adjoining colliery, that there was under the Deanery estate another valuable seam of

¹ *Elliott v. Rokeby*, L. R. 7 App. Ca. 43; S. C., 8 M. R. 651. *Clavering v. Clavering*, Mosely, 219; *Post* TENANT FOR LIFE.

coal, called the Brockwell seam, lying at a depth of about 118 fathoms below the main and five-quarter seams, which could only be opened, won or worked by means of a new pit or shaft to be made for the purpose at a very great expense; the existence of the Brockwell seam was not known or suspected in the testator's lifetime. In 1856, the lease being nearly expiring, and the coal of the main and five-quarter seams having then been nearly worked out, the lessees applied to the trustees for a lease of the Brockwell seam, and eventually, in 1858, the trustees, Mr. Scurr and Mr. Henry Spencer, with the assent of the plaintiff, agreed to grant the lessees a new lease of all the coal mines and seams of coal, as well opened as unopened, within the Deanery estate, for forty-two years, at a fixed rent of £1,800 a year.

The point in dispute was this: The plaintiff insisted that she was entitled to one-half of the rents reserved by the new lease. But Mr. Spencer contended, that the plaintiff was not entitled to one-half of the rents payable in regard to the coal in the Brockwell seam, which he submitted was and ought to be deemed an unopened mine at the death of the testator. He insisted that her right was confined to the interest to arise from the investment of a moiety of the mineral rents arising from the Brockwell seam.

Mr. SELWYN and Mr. FABER, for the plaintiff.—The original lease included all the coal, the Brockwell seam as well as the two others which were specified, and it could have been worked under the lease by the lessees. The new lease is a renewal of that granted by the testator himself and the terms are, in all respects, similar. When a mine is once opened the shaft might be sunk or a new adit driven to win a new seam, and the rent which arises from it must, in all respects, follow the devolutions of the estate: *Daly v. Beckett*, 24 Beav. 114.

Mr. F. HUGHES, for a trustee.

Mr. FOLLETT and Mr. T. STEVENS, for Mr. Spencer.—*Daly v. Beckett* has no application to the present case, for there the trustees had a power to grant mining leases; but here there is none. The Brockwell seam was in fact unopened at the testator's death; though it might have been opened, it is, in effect,

a new mine, which can not be worked for the benefit of the tenant for life. The proceeds ought to be invested; *Clavering v. Clavering*, 2 P. Wms. 388. If the testator had only opened one seam, it could not be contended that all the other seams and all the other minerals in an estate of 580 acres could be worked by the tenant for life, although they could only be reached by a new adit at a great distance.

Even where a testator has abandoned the working of a mine for some time, the tenant for life under his will has no right to treat it as an open mine and work it: *Viner v. Vaughan*, 2 Beav. 466.

THE MASTER OF THE ROLLS.

I am clear that this is the old mine; *Clavering v. Clavering*, 2 P. Wms. 388, did not confine the right to one seam. If there be one shaft by which you can work five seams, and which are all let, but only one is worked at first, I am of opinion, that when the lessee begins to work the other seams it can not be said to be opening a new mine. I have no doubt that it is substantially and practically the old mine. I agree, that if a man has opened a shaft for winning coal, and he finds in another part of his estate mines of lead or ironstone, which could not be got by means of the old shaft or opening, this would be opening a new mine; but here the lessees were at liberty to open other shafts, and to work all coal and ironstone, and I think that this is only a repetition of the working of the old mine.

REX V. THE INHABITANTS OF SEDGLEY.

(2 Barnwell & Adolphus, 64. King's Bench, 1831.)

Expressio unius—Poor rate. The express mention of coal mines in the statute, 43 Eliz., is a virtual exclusion of all other mines, and therefore other mines are not ratable to the relief of the poor.

¹**Distinction between mine and quarry.** Whether an excavation be a mine or a quarry is a question of fact; a stone working, where the stone is won by sinking the shafts perpendicularly to the stratum which lies considerably below the surface, and the stratum is worked by roads and

¹ *Rex v. Dunsford*, 4 Nev. & Man. 349; 2 Ad. & E. 568; *Bell v. Wilson*, 10 M. R. 415.

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gate heads, and the stone raised to the surface by machinery, or carried underground to a tunnel, in the same way as coal and iron ore are usually got, is a stone-mine.

By a rate for the relief of the poor of the parish of Sedgley, in the county of Stafford, made the 12th of May, 1829, the Earl of Dudley was rated as the occupier and proprietor of land and lime works at 41*l.* 13*s.* 4*d.*, being on an annual value of 1,000*l.* Against this rate he appealed, on the ground that he was overrated in respect of the yearly value of the lime works and land by him occupied in the parish; and also, that under the denomination of lime works were included certain mines of limestone, for which he was not liable by law to be rated. The court of quarter sessions quashed the rate, subject to the opinion of this court on the following case:

The appellant is the owner and occupier of lands in the respondent parish of Sedgley, containing certain strata of limestone, and also of the works hereinafter mentioned, by and out of which the limestone is raised. The strata of limestone under these lands lie in a sloping position, and one stratum distinct and a considerable distance from the other, in the same manner as coal, ironstone, etc. The strata frequently crop out or terminate at the surface, and deepen in the opposite direction. Those parts of the strata which cropped out or terminated at the surface, were worked by the appellant and his predecessors in quarries by daylight, or open work, following the course of the strata as far as was practicable. The continuations of these strata, which were in the course of being worked at the time the rate was made, lie forty or fifty yards below the surface of the ground, and are worked in large excavations by means of pit-shafts, steam engines, etc., in the same way as coal, ironstone, and other minerals, and no part of the limestone is now gotten in quarries or by open work. The produce is in part drawn up the pit-shafts, and in part sent off by an under-ground canal or tunnel.

The only difference between these, which the appellant contends are limestone mines, and which are described in the rate as lime works, and coal and ironstone mines, is the position of the strata, the material gotten out, and the greater excavations in the former than in the latter. The only way into these mines or works is down the shafts, or through the

tunnel, which is wholly underground, a great part of it being upward of fifty yards below the surface of the ground, the deepest part being at its junction with that part where the limestone is gotten. The limestone is gotten in large excavations made in the direction in which the strata run; which excavations communicate by headways or gateroads with the bottom of the shafts, and the works are lighted by candles or lamps, no part being open to daylight. The working requires experience, and is carried on by persons who are brought up to the occupation, and are called limestone miners or limestone getters, as often one as the other. The limestone is conveyed along railroads, from the part of the works where it is gotten, through the gateroads; one part to the bottom of the pit-shafts, and the other part to the canal or tunnel. That which is taken to the bottom of the pit-shafts is drawn up by the steam engines, and the other part is sent off in boats along the tunnel. By far the greater portion of the limestone gotten by the appellant is sold in its raw state to the iron founders for smelting iron; but a small portion (which, by agreement, is taken at a hundredth part of the whole) is burnt into lime by the appellant on his own land. There is no difficulty in finding the limestone, the pits being sunk, engines erected, and levels and tunnels made, and the mines or works opened and in operation. The profits of the appellant are certain, though subject to variations in consequence of frequent breakings off of the strata, and their being thrown into different directions; these increase the difficulty and expense of working, and render fresh openings necessary. Limestone strata were lately found and worked in an adjoining parish to Sedgley, at a depth of more than one hundred yards below the mines of coal and ironstone. The coal and ironstone, in that case, were first gotten, and afterward the limestone was worked by means of the same pit-shafts, which were sunk down to it. "Mines of limestone" are expressly mentioned in acts of Parliament relating to places in the neighborhood.

The case was argued in Hilary term, by CAMPBELL, MACMAHON and WHATELEY, in support of the order of sessions.

SHUTT and WHITCOMBE, *contra*.

Lord TENTERDEN, C. J., in the same term delivered the judgment of the court.

We are of opinion that the property in question is not ratable, and that the decision of the court of quarter sessions is right. The cases on the subject were all very properly quoted in the argument at the bar, and, therefore, I do not think it necessary to refer again distinctly to them. I take it to be now established as law by the several decisions, that the expression of coal mines in the statute 43 Eliz. has the effect of excluding all other mines, according to the maxim "*expressio unius*." The dicta and opinions of several judges before whom questions of this nature have been brought, may, I think, be considered as expressing the reasons by which they supposed the legislature to have been influenced in making coal mines ratable, and coal mines only. I must confess that much that has been thus said is by no means satisfactory to my own mind, and that I feel great difficulty in an endeavor to reconcile the several dicta with each other. But it is not necessary to do this. The rule of construction has been established and acted upon for a long time, and ought to be adhered to, unless we could say positively that it is wrong, and productive of inconvenience. I can find, certainly, no inconvenience in the rule; an attempt to alter or to depart from it would introduce a new subject of litigation and expense. Considering, then, as we do, the rule of construction to be established, the only remaining matter or question will be, whether the property or limestone which has been rated is properly a limestone mine; and this, perhaps, is rather a question of fact than of law. The description of the manner in which the stone in question is obtained and raised, namely, by sinking shafts perpendicularly down to the stratum, which lies considerably below the surface of the ground, and then working the stratum by roads and gateheads, with the necessary provision for air, and raising the stone to the surface by machinery, or carrying it under ground to a tunnel, is the exact description of the present usual mode of mining; of the mode used in obtaining coal, and of the mode used in obtaining ironstone. Ironstone obtained in this manner, has been held not to be ratable; why, then, should limestone be? What difference

is there between the two? The only difference that has been suggested is, that ironstone contains a quantity of metal, and is procured for the sake of the metal it contains. But, if the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way that this stone was obtained, will not be mines, nor, indeed, will coal works be mines, though, in the statute itself, they are so called. And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language. We are therefore of opinion, that the order of sessions must be confirmed.

*Order confirmed.*¹

WESTMORELAND COAL CO.'S APPEAL.

(85 Pennsylvania State, 244. Supreme Court, 1877.)

Tenant for life may exhaust open mines. A tenant for life, when not precluded by restraining words, may work open mines to exhaustion.

The word "mine" defined. The term "mine," when applied to coal, is equivalent to a worked vein, and if it be worked, a tenant for life may pursue it to the boundaries of the tract.

Coal vein underlying different tracts—Waste by life tenant. Where there are two different tracts, separated by an intervening tract owned by another, with a vein extending beneath them, the opening on one tract does not extend to the other, and the tenant for life mining under the unopened one, is guilty of waste.

Error to the Court of Common Pleas of Westmoreland County.

This was a bill in equity filed by John Irwin and others

¹ In the *Case of Mines*, Plowd. 338, it is said in argument, that there are two kinds of mines, viz.: mines royal, consisting of, or containing, gold or silver, and base mines, "which consist only of base metals, or base substances, as copper, tin, lead, iron, or coals, not having in them gold or silver." Mines of coal, iron, and stone are mentioned, Year Book, 17 Edw. 3, 7 b (Viner's Abr. tit. *Waste* (D)); mines of metal, coal, or the like, in Co. Litt. 53 b; alum mines, in stat. 21 Jac. 1, c. 3 s. 11. See a distinction between *mines* and *pits*, 1 Vin. Ab. tit. *Mine* (A), from *Clavering v. Clavering*, Cas. Ch. temp. King 79; *Post* TENANT FOR LIFE.

against the Westmoreland Coal Company, to restrain it from committing waste and for an account. It alleged that the plaintiffs are the owners of the freehold (where the alleged waste is committed) after life estate of Mrs. Martha Hughes is determined, and that it is underlaid with the Pittsburgh vein or seam of bituminous coal. That defendant has by drifts and adits opened the vein, and is mining and carrying away the coal, to the lasting injury and waste of the reversion; that defendant is a purchaser from Martha Hughes, the tenant for life, and has constructed no works on the lands which could come to the reversioners; that the coal is more valuable than the surface, and defendant has the means to take the whole of it out in a short time. The prayers of the bill are for an injunction restraining defendant from committing waste and for an account for the coal mined. Defendant filed an answer in which it is averred that the bill is defective for want of all the parties in interest; that the plaintiffs are not the owners of the fee-simple of the reversion of the freehold in question, upon the death of Mrs. Martha Hughes; that it descended to her upon the death of her son, William Fullerton, who died unmarried and without issue in 1849; that there are underlying the tract in question two veins, the upper one of about two or two and a half feet in thickness, and the lower, the Pittsburgh vein; that during the lifetime of Humphrey Fullerton, the ancestor of William Fullerton, who owned the land under the will of his father, coal was mined by him or his tenants from the upper vein; that the lower vein was not mined, but defendant is, under Martha Fullerton, lessee of both veins underlying the tract, and that she had the right to work these veins without impeachment of waste, and that defendant has opened through its other lands to the Pittsburgh vein, underlying the tract in question, and has taken out two hundred and fifty tons of coal.

That the title to the land was derived as follows: Humphrey Fullerton died seized of the land, January 29, 1835, and left a widow, Martha Fullerton, with two children, Hannah and William. Martha, the widow, September 6, 1836, married Watson Hughes, and had by this marriage two children, Anna Hughes and Harriet Hughes. Hannah and William Fullerton, children by the first marriage, both died in their minority, without issue, intestate.

A master was appointed, and he reported that the title to the land was as above stated; that on February 2, 1869, Watson Hughes and Martha, his wife, sold all their right and title to the coal underlying the tract to John George, Jr., Israel Painter and A. L. McFarland, who, on March 20, 1871, sold to the Westmoreland, Youghiogheny Coal Company which, May 14, 1872, sold to the Westmoreland Coal Company. That there are two seams or veins, a lower and an upper one, underlying the tract; the upper one was opened and mined during the lifetime of Humphrey Fullerton, but the lower one was not opened till after his death and that of his children. The upper is a small and the lower a large one, and the difference between them is sixty feet. That defendant has opened a drift through their other lands to the lower one, and had taken out coal to the amount of ninety-three one-hundredth acres, worth unmined, \$250 per acre. The master concluded that, as the lower vein was opened by defendant, it was guilty of waste, and reported in favor of an injunction. On coming in of this report the court granted the injunction and referred the case back to the master to state an account. He reported that defendants should pay plaintiffs \$1,804.52 and a decree was accordingly made. The granting of the injunction and the entry of this decree were assigned for error.

H. D. FOSTER and H. C. & J. A. MARCHAND, for appellants.

EDGAR COWAN, for appellees.

MERCER, J., delivered the opinion of the court.

The rule is well settled that it is not waste in a tenant for life, to work open mines. When not precluded by restraining words, such a tenant may work them to exhaustion. *Kier v. Peterson*, 5 Wright, 357; *Neel v. Neel*, 7 Harris, 323; *Irwin v. Covode*, 12 Id. 162.

It may be conceded that the term mine, when applied to coal, is generally equivalent to a worked vein, for by working the vein, it becomes a mine; it therefore follows that if a mine be opened and worked, the tenant for life may pursue

that vein to the boundaries of the tract on which it is found. Here the attempt is made to enlarge the rule, and to pursue it further. It is contended the right to mine is not limited or restricted to the particular tract or body of lands on which the mine had been opened, but extends to a body of lands entirely separated and removed from the other; that if a vein of the same quality and character extends from the former land to the latter, it constitutes one mine, although it has never been opened on the latter land. To this conclusion we can not assent.

If the rule would apply in this case where the parcels of lands are one mile apart, there is no limit to the distance the tenant may pursue it, short of the termination of the vein. If she has the right to open the vein on the distant tract by pursuing it under ground, she would have a right to reach it by sinking a shaft on that tract. If she has a right to the coal she is not restrained to the one manner of reaching it. Hence it would follow that the tract might be dotted over with openings, where none existed before. Neither tract is appendant nor appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened.

Decree affirmed.

1. A vein not opened is not properly a mine: *Astry v. Ballard*, 8 M. R. 316.

2. A "mine" usually imports a cavern or subterraneous place containing metals or minerals, and not a quarry: *Listowel v. Gibbings*, 9 Irish C. L. 223.

3. Right of tenant for life to open new pits: *Clavering v. Clavering*, 2 P. Williams, 388; *Post TENANT FOR LIFE*.

4. Neither the word mines alone nor the word lands sufficient to pass royal mines: *Great case of mines, Reg. v. Northumberland*, Plowden, 357.

5. Sufficient description of mines in ejectment: *Whittingham v. Andrews*, 5 M. R. 198.

6. A suit concerning title to mines is a suit involving a freehold: *Atkinson v. Tabor*, 7 Colo. 195.

See QUARRIES.

EARL OF ROSSE *v.* WAINMAN.

(14 Meeson & Welsby, 859; 2 Exch. 800. Court of Exchequer, 1845.)

¹ **Minerals defined**—"Stratum of stone"—"Fossils." When by an inclosure act certain waste lands were taken away from the lord, and allotted to commoners, except as saved by a clause which reserved "all mines and minerals," etc., "with full liberty of digging, sinking, searching for and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron, stone and fossils," and providing that in working the land for minerals the lord should keep the first *stratum* of earth separate without mixing the same with the lower *strata*: *Held*, that the act must be construed with reference to the title in the lord, and that a stratum of stone was within the reserving clause, either as a mineral, or by force of the word "fossils." *Held, further*, that the object of the act was to give to the commoners the surface for cultivation, and leave what was not requisite for that purpose; that therefore, the word "minerals" was to be construed not in its general sense as a substance containing metals, but in its proper sense, as including all matters dug out of quarries or mines.

Trover, charging the defendant with the conversion of fossils, stones, flagstones, and other minerals, to which the defendant pleaded not guilty, and a denial of the plaintiff's property.

Issue having been joined, a case was stated by consent of the parties for the opinion of this court, as follows:

For many years previous to and at the time of the passing of the act of Parliament hereinafter next mentioned, the Reverend Cyril Jackson, D. D., was seized in fee of the manor of Shipley, in the county of York.

By an act of Parliament passed in the 55th year of the reign of his late majesty King George the Third, entitled "An act for inclosing lands within the manor and township of Shipley in the parish of Bradford, in the West Riding of the county of York," after reciting that there were, within the manor and township of Shipley, in the parish of Bradford, in the West Riding of the county of York, several commons or parcels of waste ground called High Bank and Low Moor, and several other parcels of waste ground, containing in the whole, by estimation, 280 acres, or thereabouts; and also reciting that

¹ *Church v. Enclosure Com.* 11 Com. B. N. S. 664; *Rex v. Woodland*, 2 East, 164.

the Reverend Cyril Jackson, D. D., was lord of the manor of Shipley, and as such was owner of the soil of the said commons and waste grounds, and entitled to all mines and minerals within and under the said commons and waste grounds; and reciting that the said Cyril Jackson, and several other persons, were owners and proprietors of estates within the manor and township of Shipley aforesaid, and in respect thereof were entitled to right of common and other rights and interests in and upon the said commons and waste grounds; it was (amongst other things) enacted that the commissioner appointed for carrying the said act into execution should, after setting out and appointing the public carriage roads and highways through and over the said commons and waste grounds intended to be divided, allotted and inclosed as aforesaid, set out, allot and award unto and for the said Cyril Jackson, as lord of the said manor, and to such person or persons as should then be entitled to the said manor, his, her or their heirs and assigns, such part and parcel of the residue and remainder of the said commons and waste grounds as should, in the judgment of the said commissioner, be equal in value to one full sixteenth part of the said residue of the said commons and waste grounds, in lieu of and as a full recompense for all such right and interest in and to the soil of the said commons and waste grounds as was not thereafter expressly saved and reserved.

And it was further enacted that the said commissioner should, in the next place, set out such part or parts of the said commons and waste grounds as he should think proper, not exceeding two acres in the whole, to be used and enjoyed by the respective proprietors of land within the said manor and township of Shipley, for the purposes of common watering-places for cattle, and getting stones and other minerals for erecting and repairing buildings, bridges, walls, fences and other works, and for the reparation of public and private roads within the said manor and township.

And it was further enacted, that the said commissioner for the time being should set out, assign and allot the residue of the said commons and waste grounds unto and amongst the said Cyril Jackson and the said several other persons entitled to right of common or other rights and interests in and upon the said commons and waste grounds, their respective heirs,

executors, administrators and assigns, according to the value of the messuages, cottages, mills, old inclosed lands, tenements, and hereditaments in respect whereof they were so respectively entitled to such right of common as aforesaid, and according to the value of such other rights or interests as aforesaid.

And it was thereby further provided and enacted, that nothing therein contained should extend or be construed to extend to defeat, lessen or prejudice the right, title or interest of the said Cyril Jackson, or any future lord or lords, lady or ladies of the manor of Shipley aforesaid, in or to the seigniories and royalties incident or belonging to the said manor of Shipley; but that the said Cyril Jackson, and such other person or persons as aforesaid, should and might from time to time forever thereafter hold and enjoy all rents and services, courts, perquisites and profits of courts, goods and chattels of felons and fugitives, felons of themselves, persons outlawed and put in exigent, deodands, waifs, estrays, forfeitures, and all other jurisdictions whatsoever in and upon the said commons and waste grounds, thereby directed to be divided and inclosed as aforesaid, and all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample and beneficial a manner, to all intents and purposes, as they could or might, respectively have held and enjoyed the same in case the said act had not been made; and that the said Cyril Jackson, and such other person or persons as aforesaid, should and might, from time to time, and at all times thereafter, have, hold, win, work and enjoy, exclusively, all mines and minerals of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof, together with all convenient and necessary ways, and full liberty of laying, making and repairing wagon ways and other ways in, through, over and along the said commons and waste grounds, or any part thereof, and with full and free liberty, power and authority of digging, sinking, searching for, winning and working the said mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone and fossils to be gotten thereout, and of making pits, shafts and pumps, pit-rooms, drifts, levels and watercourses, and of repairing, amending and upholding the same, and of erecting, building and using

houses, kilns, fire-engines and other engines, mills, and other erections and buildings, and of altering, changing, pulling and carrying away the same, or all or any of the materials thereof, at their free will and pleasure, and to do, execute and perform all such other works, matters and things, either then in use or thereafter to be invented, as should or might be necessary or convenient for the full and complete working, use and enjoyment of the said mines and minerals thereby reserved, in as full, ample and beneficial a manner, to all intents and purposes, as they might or could have done in case the said act had not been made, without any interruption, disturbance, claim or demand whatsoever; provided, nevertheless, that the said Cyril Jackson, his heirs and assigns, and his and their tenants and lessees, should, and they were thereby required, in the searching for and working the said mines and minerals, to keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower stratum.

And it was thereby further enacted, that all and every such damage and injury as should or might be occasioned in any allotment or allotments which should be set out under that act, by means of the searching for or working the aforesaid mines and minerals, or any of them, or on account of any works, buildings, or concerns relating thereto, upon or within the said allotments, should be reimbursed to the owner and owners, occupier and occupiers, of the same allotments respectively, and should be borne and paid by the several owners of the allotments to be made in pursuance of the said act.

The commissioner appointed by the said act of Parliament, in due manner, on the 30th of May, 1825, made his award, and did thereby, amongst other things, allot and award unto the heirs or devisees of William Wainman, Esq., in lieu of his rights in the commons or waste lands of the manor of Shipley, as owner of certain freehold land within the said manor, four several allotments or inclosures of land.

By indenture of lease and release, dated the 28th and 29th of February, 1820, the said manor of Shipley, with the manorial rights thereto belonging, by the description of all that the manor or lordship of Shipley, with the rights, members and appurtenances thereof, situate, lying, and being in the parish of Bradford aforesaid, and also all and every the mines and

minerals, of what nature or kind soever, lying and being within or under all and every the lands and grounds theretofore divided and inclosed under or by virtue of the said act of Parliament, with all such liberties, privileges, powers and authorities of digging, sinking, searching for, winning, working, and enjoying, taking and carrying away the said mines and minerals, as were reserved, granted, and limited in and by the said act, unto the said Cyril Jackson, or any future lord or lady of the said manor, were, together with a considerable estate, in the same township, conveyed and assured by the devisees in trust of the said Cyril Jackson, unto John Wilmer Field, late of Heaton, in the county of York, Esq., deceased, and his heirs and assigns.

The said manor and estate continued vested in the said John William Field down to the year 1837, when he died intestate, leaving two daughters, (of whom Mary, Countess of Rosse, the wife of the plaintiff, is one) his coheirresses-at-law, him surviving; and, by virtue of certain settlements since executed, the said manor and estate of Shipley, before the taking of the stone by the defendant's authority as hereinafter mentioned, became and were, and now are, legally vested in the plaintiff, as tenant for life thereof, without impeachment of waste.

Beneath the common lands inclosed under the provisions of the before mentioned act of Parliament, are several valuable beds of coal and iron-stone, and nearer the surface there is also, in some places, the stone common in the district.

The defendant, before the taking of the stone hereinafter mentioned, became seized of a life estate in the said pieces of land so allotted by the award of the said commissioner to the heirs or devisees of the said William Wainman, as aforesaid, subject to the provisions of the said act.

The defendant, having ascertained that there was some stone fit for building under one of the said allotments to which he is entitled for life, as aforesaid, agreed to sell such stone to Messrs. Nathan Atkinson, William Hill, Thomas Hillary, David Hillary, and George Hillary, all of Bradford aforesaid, stone merchants, who forthwith commenced getting it, and by the authority of the defendant, previously to the commencement of this action, raised, severed, took and carried away 296 superficial square yards of the said stone, the same being of the

value of 44*l.* 8*s.* The plaintiff claimed from the defendant that, as lord of the said manor, he was entitled to the said stone so found and raised in the said allotment; but the defendant denied that the plaintiff had such right; whereupon the plaintiff caused this action to be brought.

The question for the opinion of the court is, whether the plaintiff is entitled to the said stone so gotten and raised under the said allotment. If the court shall be of that opinion, then the parties consent that judgment shall be entered for the plaintiff, by confession, for 44*l.* 8*s.* damages; but if the court shall be of the contrary opinion, then the parties consent that judgment of *nolle prosequi* shall be entered for the defendant, but with liberty to either party to take the case down to trial, for the purpose of turning it into a special verdict. Copies of the Inclosure Act, and of the award of the commissioner, accompany this case, and form part of it.

The point marked for argument on the part of the plaintiff was, that he contended he was entitled to the stone in question as lord of the manor of Shipley, according to the true construction of the Shipley Inclosure Act, and especially of the reservation therein contained to the lord of all the mines and minerals under the several allotments to be set out under the provisions of the act.

The case was argued by

HUGH HILL, for the plaintiff.

COWLING, *contra*.

PARKE, B.

The question in this case is, whether the plaintiff, Lord Rosse, is entitled to the stratum of stone under the allotments of the waste of the manor of Shipley, inclosed by virtue of the act of 55 Geo. III, Chap. 18.

Lord Rosse is the assignee of Dr. Cyril Jackson, who was lord at the time of the inclosure, and has all rights reserved to him by the Inclosure Act.

What these rights are depends upon the construction of the act, which is not very clearly expressed, and is open to much

doubt; but the result of our consideration of the whole of its provisions is, that, in our opinion, the right to the stratum of stone was reserved to the lord, and consequently the plaintiff is entitled to recover.

It is clear, from the recital, that, before the passing of the act, the lord was entitled to the soil of the waste, and to everything constituting that soil, including every stratum of stone; and the question is, how much of this right is taken away and transferred, under the Inclosure Act, to those to whom allotments are made?

All is taken away except that which is reserved by the saving clause (the 32d) which is to be construed with reference to the original title of the lord to the whole of the soil. That section provides that nothing in the act contained is to be construed to extend to defeat, lessen or prejudice the right, title or interest of Cyril Jackson, or any future lord or lords of the manor of Shipley aforesaid, in or to the seigniories and royalties belonging to the said manor of Shipley, but that Dr. Jackson may from time to time enjoy all rents, services, courts, etc., and all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample and beneficial a manner, to all intents and purposes, as they could or might respectively have held and enjoyed the same in case this act had not been made." Then it goes on to make a provision for the working of the mines and minerals: "And that the said Cyril Jackson, and such other person or persons as aforesaid, shall and may, from time to time and at all times thereafter, have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof, together with all convenient and necessary ways, and full liberty of laying, working and repairing wagon-ways and other ways in, through, over and along the said commons and waste grounds, or any part thereof, with full and free liberty, power and authority of digging, sinking, searching for, winning and working the said mines and minerals, and leading and carrying away the lead ore and coal, iron-stone and fossils, to be gotten thereout, and of making pits, shafts and pumps, etc., and of erecting, building and using houses, kilns, fire en-

gines and other engines, etc., at their free will and pleasure, and to do, execute and perform all such other works, acts, matters and things, either now in use or thereafter to be invented, as shall or may be necessary or convenient for the full and complete working, use and enjoyment of the said mines and minerals thereby reserved, in as full, ample and beneficial a manner, to all intents and purposes, as they might or could have done in case this act had not been made, without any interruption, disturbance, claim or demand whatsoever: Provided, nevertheless, that the said Cyril Jackson, his heirs and assigns, and his and their tenants and lessees, shall, and they are hereby required, in the searching for and working the said mines and minerals, to keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata."

The term "minerals" here used, though more frequently applied to substances containing metals, in its proper sense, includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that "all metals are minerals, but all minerals are not metals;" and mines, according to Jacob's Law Dictionary, are "quarries or places where anything is digged;" and in the Year Book, 17 Edward III, Chap. 7, "*minerae de pierre*" and "*de charbon*" are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners, and to leave in the lord what it did not take away for that purpose; and this construction is greatly favored by the last clause, which provides that the surface soil, "the first *layer* or stratum of earth, is to be kept separate, without mixing with the lower strata;" a provision which clearly indicates that the removal of the surface soil to a great extent may take place, and be subsequently restored, so that the getting strata of stone by quarrying must have been contemplated.

It must, however, be admitted that the provision authorizing the working of mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone, and fossils, leads to the supposition that the legislature intended to reserve the metallic minerals only and creates much doubt about the true

construction of the word in this act. But the word "fossils," in a strict sense, may apply to stones dug or quarried; at any rate, we do not think that this provision so clearly indicates the intention of the legislature to limit the proper meaning of the word as to call upon us to do so.

We place no reliance on the word "minerals" being connected with stone in the 18th section and treated as *ejusdem generis*, as the word is probably introduced by mistake for the word "materials."

We are, therefore, of opinion that the plaintiff is entitled to recover.

Judgment for the plaintiff.

DARVILL V. ROPER.

(3 Drewry, 294. High Court of Chancery, 1855.)

¹**The word minerals limited to the product of mines, excluding the product of quarries.** In an agreement for partition and the deeds carrying out that agreement the mines of lead and coal and other mines and minerals were excepted, and it was expressed that the profits of the mines excepted should be taken according to the respective estates of the parties. *Held*, that the word minerals was limited by the context to include the product of mines as distinguished from that of quarries, and that limestone quarried from the surface was not within the exception.

²**The distinction between a mine and a quarry** is that in a quarry the surface is removed, but in mining the beginning only is on the surface and a roof is left overhead.

The facts of this case were in substance these: In 1799 certain real estates of considerable extent in Denbigh and Flint were held by certain persons as tenants in common in certain shares. There was some question as to what were the precise shares of the different individuals, and, as to one of them, a question whether he was entitled at all. However, in substance, matters stood thus: In 1782 George Boscawen had made a settlement of one fourth of these estates for his life, with limitations over, and with an ultimate limitation to his issue female; and the settlement con-

¹ *Hartwell v. Camman*, 3 M. R. 229.

² *Rex v. Brettell*, 3 B. & Ad. 424.

tained a power of partition. Another one fourth became shortly afterward vested in Mr. Boscawen in tail. The other two fourths were vested in two ladies, one Mary Jane Lady Dacre, the other Gertrude Lady Dacre; she was entitled to one tenth. Ultimately, the whole of that moiety became vested in Mary Jane Lady Dacre.

On the fourteenth July, 1798, the parties interested entered into heads of agreement: G. Boscawen of the first part, Mary Jane Lady Dacre of the second part; Gertrude Lady Dacre of the third part and Lord Dynevor of the fourth part; and they agreed by it that two gentlemen, Messrs. Boydell and Leggatt, should have full powers to survey and value the corporeal hereditaments and tithes late the estate of T. Trevor, the original owner of the estate, the mines of lead and coal and other mines or minerals only excepted, and to declare under their hands the values in money of the several estates respectively, etc.; and it was agreed, that the valuation made by Boydell and Leggatt should be taken as the true values for making an allotment. That instrument was the foundation of the whole of what took place afterward. Boydell and Leggatt made their survey and report in writing on the 13th May, 1799, which report contained the values of the respective portions, the mines and minerals excepted.

This agreement was followed by a deed dated the 26th July, 1799, made between Mary Jane Lady Dacre of the one part and Mr. Boscawen of the other part, by which, after reciting these instruments, and that they had agreed to confirm the report and to convey their shares to each other, they approved and ratified the report, and they covenanted to carry out the partition with the exception of the mines and minerals. And then, in pursuance of this deed, conveyances dated the 19th and 20th September, 1800, and other indentures of the same date, were executed, by which Mary Jane Lady Dacre conveyed to G. Boscawen her moiety, and G. Boscawen conveyed to Mary Jane Lady Dacre his share, each excepting the mines of coal and lead and other minerals. That was the state of the titles of the parties at the time of the institution of the suit.

In that portion of the property which was thus allotted to Mary Jane Lady Dacre, there were certain lime rocks of considerable extent, on particular farms. Those lime rocks were,

at the time of the partition, worked by means of a quarry, but, owing to the local circumstances, to a very small amount, and the rent was very small, viz., about £1 a year, and of course at the time when the partition was made all parties were entitled to share in that rent. It appeared that from that time the lime rocks continued as before to be worked, and the rent derived from working them as lime quarries on the portion allotted to Mary Jane Lady Dacre was received entirely by her. But for some years before the filing of the bill, owing to the change of circumstances, the lime rocks became of much larger value. Instead of yielding somewhere about £1 a year they yielded some hundreds, and they were extensively worked at the time when the bill was filed. The plaintiffs claimed under G. Boscawen to be entitled to the profits derived from the working of these limestone rocks, against the defendants claiming under Mary Jane Lady Dacre, on the allegation that they were excepted out of the conveyance to her under the exception of mines and minerals. As to the position and character of those lime rocks, they extended over portions of certain farms, with a river running through the bed of the rocks, so that they could be clearly seen; and a considerable portion was so entirely on the surface that in some parts there was no covering of earth at all, and in others a mere thin covering.

The bill was filed in 1852. In support of it various affidavits were filed, among others, affidavits by Professor Ansted, Dr. Ure and Mr. Tennant, well known scientific chemists and mineralogists. These gentlemen agreed in defining minerals to be any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. The bill also alleged a local meaning as attached to the term "minerals," by the custom of the counties, as including limestone. On this point a cloud of respectable local witnesses, engineers and solicitors, deposed to that being the local interpretation of the term; and an equally respectable and heavy cloud of witnesses deposed to there being no such local interpretation.

MR. BAILY and MR. KARSLAKE, for the plaintiff, contended that the scientific interpretation was the proper one to put on the word minerals in the agreement and conveyances, and, that

being so, the limestone rocks were clearly included in the exception; that it was quite immaterial how they were worked, whether by mining or quarrying, the agreement being silent as to the mode of working, but excepting minerals. If, then, these lime rocks were minerals, they were excepted, however worked. The local usage was also in their favor, the evidence of the witnesses all going to show that in leases in those counties limestone was always treated as a mineral.

Mr. SWANSTON and Mr. G. SIMPSON, for the defendants.

If the scientific designation is adopted, the result must be to include in the exception every particle of the earth except the mere herbage and surface; for according to that interpretation, stones, gravel, or anything not vegetable, is a mineral. That could not be the intention of the parties. The true construction must be that the exception includes only what are commonly understood as minerals, viz., that which is mined by boring or sinking pits, not that which is quarried in open quarries, by removing the surface. As to the alleged local custom, the evidence is conflicting.

The following authorities were referred to: Bainbridge on Mines, 1; *Rex v. Sedgley*, 2 Barn. & Ad. 65; *Rex v. Brettell*, 3 Barn. & Ad. 424; *Earl of Rosse v. Wainman*, 14 M. & W. 859; *Micklethwaite v. Winter*, 6 Ex., 644; *Clayton v. Gregson*, 5 Ad. & El. 302; *Bullen v. Denning*, 5 B. & C. 842; *Rex v. Alberbury*, 1 East, 534.

The vice-chancellor stated the facts as above detailed, and proceeded:

This I think is at least clear; whatever was the intention of the parties to the agreement of the 14th July, 1798, the original agreement, with reference to the partition and the valuation by Boydell and Leggatt, and whatever was their intention as to the reservation out of it of mines and minerals, that intention was properly carried into effect by the report of Boydell and Leggatt. (His Honor referred to the report mentioned in p. 407.)

I must assume that, by the conveyances of the 19th and 20th September, 1800, the parties to them carried out the previous intention which they had in the agreement. If, therefore,

there were any difference between the language of the deed of 1800 and the language used in the original agreement, I should look at the language of the original agreement as controlling the other. Now the question that I have to determine is, whether the intention of the parties was to make partition of all the soil as well as of the herbage, excepting only some portions of the soil, under the description of mines and minerals, or whether their intention was to reserve from the partition everything consisting of the soil. That is the question.

Now, with regard to the terms mines and minerals, there can be no doubt that the term "mines" may be used in several different senses. But as to the term mines, if there were no other word used, I do not think there can be any fair doubt of its meaning here.

Is a mine and a quarry the same thing? According to the ordinary sense of the term mine, does it mean a quarry? I apprehend clearly not. The meaning of the term does not depend on the nature of the fossil body obtained, it depends on the nature of the mode of working it. Some mines may be worked by means of mining, others by means of quarrying, and, upon the case here shown, the limestone was worked by quarrying. They were not limestone mines, but limestone quarries. That which is worked by mines is by a means of working in which the surface is not disturbed, and when limestone is so worked then it is a limestone mine. It is clear that in the popular, and I think in the just and accurate sense of the distinction between mines and quarries, the question is, whether you are working so as to remove the surface, including perhaps portions of the lateral surfaces so as not to leave a roof. Mining, is when you begin only on the surface, and by sinking shafts, or driving lateral drifts, you are working so that you make a pit or a tunnel, leaving a roof overhead.

As to the word mines, therefore, there would not be much difficulty. But the word here material is the word minerals. In what senses may that word be used? Now one sense is that in which it is used by scientific mineralogists, professors of science; and we have the testimony of several gentlemen of that character, who state what is the scientific meaning of the word minerals. (His Honor referred to the meaning put on

the word in the affidavits of Professor Anstead, Dr. Ure and Mr. Tennant.) That, therefore, is one of the senses in which the word minerals may be used. The objection to that sense as regards this case, that if that is the meaning of the term, every portion of the soil, not merely the limestone rock, but the gravel, the pebbles, all, even to the very substance of the loam or mould which forms the soil, would be included. Now, it appears to me, that it is impossible to attribute that meaning to the parties. They must according to that interpretation of the term, have intended to partition no particle of any portion of the soil, but merely the vesture.

Therefore, without contradicting at all the correctness of the definition of the scientific gentlemen, I am satisfied that is not the sense in which the term is used here. Another sense in which the term minerals is used and, perhaps, the most frequent sense, though it by no means follows it is the necessary sense, is that of metalliferous substances; that is a very common sense of the term, and a sense in which it is not impossible that it was used in these instruments. It is contended on the part of the plaintiff, that that can not be the sense in which it is used in the agreement, because the agreement mentions mines of lead and coals, and that although one of those, lead, is metallic, coal is not metallic. Therefore you can not, is their argument, confine the term to metalliferous substances. But I do not see that that is the necessary consequence of the terms of the agreement. If coal only had been mentioned before, then the term might not have been confined to metalliferous substances; but, when both are mentioned, the language is not inaccurate, and does not compel me to say that the term was not used in the restrictive sense of metalliferous substances. But I do not think the term used should here be confined to metalliferous ores. If they had found a stratum of fire clay, or porcelain, worked by means of a mine, I do not see that that would not be included, although those are clearly not metalliferous substances. Although therefore the term minerals may be used in that sense, it does not appear to me to be the sense here intended. There is then a third sense in which the word minerals may be used, viz., all such substances as are dug out of the earth by means of a mine, a meaning which, without being opposed to the other senses,

is in accordance with the derivation and etymology of the word; for whatever may be the origin of the word mine, minerals is clearly derived from mines. A mineral is etymologically, properly a substance dug out of the earth by means of a mine. Then there is a fourth sense, in which it is suggested that the term minerals is to be taken, viz., such meaning as is put on it by local usage.

On the part of the defendant much evidence is given by persons from the position competent to give an opinion, their competency being derived from different sources, resident in the counties of Denbigh and Flint. They say there is a local meaning given in those counties to the word minerals; which is, metalliferous ores; and they mention instances without end of persons possessed of the rights under instruments of lease and otherwise to mines and minerals, who they say never dream of working limestone. Then the plaintiff calls other persons, I believe about the same number, of equal means of knowledge, and they say that no such distinction as to the meaning of the word is known in those two counties. If a local usage as to the understanding of the word was well established, I do not say I should not regard it; but when I find such conflict of evidence on a question of fact, I can not look at it on either side.

Now one settled rule in interpreting contracts is this: if there be any uncertainty as to the meaning of a particular term, you are to give it its primary, its ordinary meaning. And the question here is, what is the ordinary meaning; certainly it is not the scientific meaning; and I do not see any reason for coming to the conclusion that it must be confined to metalliferous ores. But I need not determine what is the primary meaning; if I were compelled to do so, I should have the greatest difficulty in determining. I have already stated my reasons why I consider it absolutely impossible to adopt the scientific meaning. Discarding, therefore, that, does it mean metalliferous ores only, or substances dug out of the earth whether metalliferous or not.

I must for this purpose look to the instruments themselves to see whether any intention is apparent, which will help as a guide to the construction; and I think I do find such an indication of intention, strong enough to lead me to a conclu-

sion as to the sense in which the parties used the expression as between themselves. The language of the reservation is, "Mines of lead and coal and other mines or minerals." Having directed the surveyors to make their survey and valuation, and the surveyors having made their reports, then the language of one of the deeds for carrying this into effect, provided that the profits of the mines excepted out of the valuation, should be taken between the parties according to their several estates, rights, etc., in the premises.

Now, if the intention of the agreement was to except mines, and then under term "minerals," something more than mines, the language of the deeds providing for the mode of enjoyment of that of which, with exceptions, they were stipulating for the enjoyment—if they had intended to except more by the word minerals than mines, they would have expressly extended it by the use of the word minerals. But when I find that when, having made an exception, they come to stipulate as to what is to be done with the property excepted, they use only the word mines, it appears to me that there is a strong ground for inferring that did not mean to except any other minerals than minerals worked by means of mines. Then let us see whether that interpretation is not fortified by the nature of the transaction. It is to be observed that the whole scope and object of the transaction was this,—tenants in common wishing to hold in severalty. Their object was partition, with as little exception as possible ; to divide so much as it was possible to divide without great difficulty. Thus, if there were on the land stones, or rocks, or even masses of clay, which were apparent on the surface, or apparent to the eye, that is, apparent to persons going over the land for the purpose of surveying it, their intention was to make partition of all that. But with regard to those ores, etc., which were or might be of value, but which were deep in the earth and the valuation of which could not be easily or at all made, except by subterraneous digging or boring, it is natural to suppose that those were to be excepted. That is, their object would be to except only such things as could not be valued, except by means of works of such an extent and character, that to carry them into effect, would defeat the purpose of partition. They meant to reserve only so much as could not be partitioned without great expense ;

and that consideration of the nature of the transaction fortifies, I think, the view which I take of the construction of the agreement. Then there remains this consideration,—what interpretation have the parties themselves put upon it? Why, the acts of the parties have been without variation in accordance with the construction of the words which I adopt. Take the conduct of the defendants. They hold the property allotted to Mary Jane Lady Dacre; they had the lime rocks in work at the time of the partition; that working has been continued and extended, and the profits uniformly derived by them, without any attempt by George Boscawen to claim any share or interest in those profits for nearly half a century.

What have the plaintiffs done on the other hand? It appears they have considered themselves from time to time entitled to dig gravel, etc., and to sell it; so that both parties have been working by quarrying, one quarrying limestone, the other quarrying gravel, etc.

It appears to me, that on all these grounds, I must determine that the plaintiff is not entitled to any interest in these lime rocks.

But before parting with the case, I must refer to some of the authorities cited. The first, and the one principally relied on by the plaintiff, is that of *Rosse v. Wainman*, in the 14th Mees. & Wels. 859. (His Honor referred to this case, and in particular to the judgment, and pointed out that it went on the particular intention.)

It appears to me that the ground of decision in that case was rather the ground on which I partly founded this decision, viz., the nature of the transaction showing the intention of the parties. Then *Micklethwaite v. Winter* simply followed the former case. (His honor then referred to the definition of mines in the judgment in that case, observing that, if it was meant to say that the proper meaning of mine is quarry, he differed from that view, without contesting that it might be sometimes used in that sense.)

Then as to *Rex v. Brettell*, the act there under consideration had enacted, that all coal mines should be ratable, and the conclusion that the court put on the statute was, that the express inclusion of coal mines excluded all other mines. In that case the limestone was worked by means of a mine; and

the question was, whether the limestone was or not ratable; the question there was, what is a mine, and the court held it depended on the mode of working. That is a clear decision that a mine and a quarry are not identical.

Then as to *Rex v. Alberbury*, in that case the limestone was worked by a quarry, and, according to the judgment, it was held not to be a mine.

So in the case of *Rex v. Alberbury*, 1 East, 534; and with the exception cited from Jacob's Law Dictionary, I find in no law book, nor in any other work, the least doubt expressed that there is a clear distinction between a mine and a quarry. So far from there being any authority for holding that a mineral is any crystalline or earthy substance worked in any manner, there is authority to show, first, that mines and quarries are different, and that being established, then that the term minerals, as used in this contract, can be used only in the sense of those minerals which could only be worked by means of mines, that is, by underground diggings.

The court, therefore, held, that the plaintiff had no claim, and dismissed the bill.

BELL V. WILSON.

(L. R. 1 Ch. App. Cases, 303. Court of Appeal in Chancery, 1866.)

¹**Minerals defined by the mode of getting.—Freestone.** In a conveyance the grantor reserved all "mines or seams of coal and other mines, metals or minerals," with liberty to get the same, etc. *Held*, that the term minerals included freestone but that the grantor had liberty to get the freestone only by under-ground mining and not by working in an open quarry.

The word mines implies underground workings.

²**Parol evidence.** The terms of a reservation in a conveyance are not to be limited by what was ordinarily gotten by a miner in the particular county at the time of the execution of the deed.

This was an appeal from a decree of Vice-Chancellor Kindersley.

¹ *Griffin v. Fellows*, 8 M. R. 657.

² *Hartwell v. Camman*, 3 M. R. 229.

The bill was filed for an injunction to restrain the defendants, Frederick William Wilson, George Besley Wilson, and John Simpson, from working a bed of freestone or sandstone, and from selling or removing the stone gotten on an estate at Long Benton, in the county of Northumberland, and for an account and an assessment of damages in respect of previous workings of stone on the said estate.

The estate from which the freestone in question was worked was purchased in 1801 by Henry Utrick Reay of Richard Wilson, under an order of the court of chancery, made in a suit for administering the estate of the grandfather of Richard Wilson, and was conveyed to him by indenture of lease and release, dated the 9th and 10th February, 1801. The indenture of release contained the following exception: "excepting, nevertheless, unto the said Richard Wilson, and all and every other person or persons seized or entitled either at law or in equity, of or to all that close or parcel of land called South White Ridges, under the last will of Richard Wilson, the father of the said Richard Wilson, *inter alia*, all mines and seams of coal and other mines, metals or minerals, as well opened as not opened, within and under the said closes or parcels of ground, hereby granted and released, with full liberty to search for, dig, bore, sink, win, work, lead, and carry away the same, and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, and to drive and make drifts, drains, levels, staples, water-grates and water-courses of any kind, in, over, under, through, or along all or any part of the said closes or parcels of ground, with sufficient ground room and heap room, and to erect fire engines and other buildings, and to exercise, do and perform every liberty, matter and thing necessary for digging, sinking, winning and working the said collieries, mines and minerals, and free way leave and passage to and from the said collieries, mines and minerals, in, through and over the same close or parcels of ground, or any of them, or any part thereof respectively with agents, workmen, horses, wagons, carts and carriages, with liberty to make all such wagon-ways, and other ways as shall be necessary and convenient for that purpose, and according to the usage or custom of the country, paying a reasonable satisfaction for all damages or spoil of ground to be occasioned thereby."

Henry Utrick Reay died in 1828, and under his will in the

events which had happened, the plaintiff, Elizabeth Ann Bell, the wife of Matthew Bell, was entitled for her life, to her separate use, to the rents and profits of the estate at Long Benton, and also to the ultimate reversion in fee, subject to certain intermediate remainders. The other plaintiff was the surviving trustee of the will.

The mines excepted and reserved by the deed of the 10th of February, 1801, became vested in the defendant, Frederick William Wilson, who, by an indenture of the second of October, 1858, demised the quarries and beds of stone under some of the closes comprised in the deed, for a term of ninety-nine years, to his son, the defendant, George Besley Wilson; and he again, by an agreement dated the 4th of December, 1862, let the same quarries and beds of stone to the defendant, John Simpson.

The closes of land comprised in the deed of 1801 are on the surface of the clay or shale formation overlying a bed of free-stone beneath which there is a seam of coal, under which there is another bed of freestone. The first mentioned bed of freestone is at a depth varying from about six feet to about forty feet below the surface of the closes. And it varies in depth or thickness from about thirty-six feet to about seventy feet.

In or about the year 1855, the defendant, Frederick William Wilson, began to work the stone under the surface of the closes by open quarrying, but the workings not being then found profitable, were soon afterward abandoned.

In the month of December, 1862, however, the defendant, John Simpson, began again to work the stone under some of the closes in the same manner, laying open the ground to a depth varying from six feet to twenty feet below the surface, for the purpose of quarrying the freestone.

Under these circumstances the plaintiffs, after some previous correspondence, filed their bill on the ground that the freestone was not included in the exception contained in the deed of 1801, and praying for an account and injunction, as before stated.

The parties had admitted, as part of the evidence in the cause, that part of the bed of freestone was about six feet below the surface, and that a portion of the said bed was of suffi-

cient thickness to be capable of being worked by underground workings; yet that there had been up to that time no instance of any underground workings of stone in the county of Northumberland.

The vice-chancellor was of opinion that the freestone was not included in the reservation in the deed, and that the defendants had no right to work it either by underground mines or by open quarries; and he accordingly granted the relief prayed by the bill. From this decision the defendants appealed.

Mr. BAILY, Q. C., and Mr. BURDON, for the plaintiffs.

Mr. G. M. GIFFORD, Q. C., and Mr. T. STEVENS, for the defendants.

Sir G. J. TURNER, L. J., after stating the facts as mentioned above and the decree of Vice-Chancellor Kindersley, continued:

The questions upon this appeal are, whether under the exception contained in the deed, the defendants are entitled to the upper bed of freestone, and whether, if they are so entitled, they are entitled to get the stone by the mode of open quarrying which they have adopted.

Upon the first of these questions, I regret to say that I find myself unable to agree in the conclusion at which the vice-chancellor has arrived; the words of this exception are most general and comprehensive (his lordship read the clause) and if it can be held that the freestone is not included in these words, it can only be, as it seems to me, upon one or other of these grounds, either that the freestone is not a mineral, or that, being a mineral, the nature or context of the deed shows that it was not intended to be included. But the cases are, I think, quite decisive upon the point that freestone is a mineral, and I can find nothing in the nature or context of this deed to show that it was not intended to be included in the exception. The vice-chancellor appears to have considered that the intention was to reserve only that which was ordinarily gotten by a miner in the county of Northumberland at the time of the execution of the deed, but the deed does not refer to what is ordinarily gotten, and I think this construction goes too far in

cutting down the effect of the general words, which, as I take it, in the absence of manifest intention or context to the contrary, ought to have their full effect. This construction would probably operate to prevent the general words extending to many other subjects than freestone. If, indeed, effect could not be given to the exception without destroying the previous grant, this might be considered to show an intention that the exception should not include the freestone, but I do not think this would be the case. It was argued for the plaintiffs that it appears from the deed that the parties must have known the position of the different strata in these closes of land. But this argument cuts both ways, for it may well be that the general words were inserted in consequence of that knowledge.

Upon the first question, therefore, I respectfully differ from the vice-chancellor, but upon the other question, I entirely agree in his opinion. I am satisfied that it was not intended by this deed that the freestone should be worked by the means which the defendants have adopted, or otherwise than by underground mining. The language of the exception points I think to this conclusion; it is an exception of "mines within and under the lands, whether opened or unopened," words which are ordinarily used with reference to underground workings. And although, perhaps, it can not be said that there are not words in the clause which might be construed to extend to and authorize workings upon the surface of the closes, it can not, I think, be denied that the clause, taken as a whole, points much more strongly to underground workings.

Some question was made in the course of the argument as to the meaning of the words in the deed, "mines, metals, or minerals;" and I am much disposed to agree with the construction which Mr. Burdon put upon these words, that they mean mines, whether of metal or of mineral. Then, what is a mine? Upon reference to the lexicographical part of the *Encyclopædia Metropolitana*, I find it there said that the word "mine" is derived from a Latin word of the lower ages, "*minare*," signifying "*ducere*, to lead;" and the interpretation of the word is, "to draw or lead, etc.; a way, or passage underground; a subterraneous duct, course or passage, whether in search of metals or to destroy fortifications, etc.;" and

the cases of *Rex v. Sedgley*, and *Rex v. Brettell*, seem to me to support this definition to this extent, at least, that mines are underground workings, and that this is so, is, I think, much confirmed by the definition of the word "quarry," which is to be found in the same dictionary. The word "quarry" is there stated to be derived from the French word "*quarriere*," and the derivation is followed by this description: "In the Latin of the lower ages, *quadratarius* was a stone cutter *qui marmaro quadrat*, and hence, *quarriere*, the place where he *quadrates* or cuts the stone in squares; the place where the stone is cut in squares; generally, a stone pit;" clearly, therefore, referring to a place upon or above, and not under the ground. My opinion, therefore, on the second point entirely agrees with that of the vice-chancellor.

The case then is, in this singular position, that the defendants were entitled to the stone, working it by underground mines, but were not entitled to work it from the surface; the consequence, as I think, must be, that the plaintiffs are entitled to the account directed by the decree, of what has been got by the improper working. There is not, I suppose, any dispute between the plaintiff and her husband, the defendant, Matthew Bell, and it is not, therefore, material to consider whether the plaintiff, Elizabeth Ann Bell, is entitled to the money which may be found due upon the account, by virtue of her separate estate for life, or of the remainder in fee, which is vested in her.

The only question as to these moneys can be, whether the plaintiff, Elizabeth Ann Bell, is entitled to them, as against the persons having estates in remainder, prior to the ultimate limitation in fee, vested in her; and I think, upon the authority of the case of *Bewick v. Whitfield*, 3 P. Wms. 237, that she is so entitled.

It was objected on the part of the defendants, the Wilsons, that they had been improperly saddled with the costs of the suit, but I think that no decree could have been had against the defendant Simpson in their absence, and that they were therefore proper parties to the suit; and as they have contested the rights of the plaintiff, I think they have been properly charged with the costs. In the result, the declaration contained in the decree must be altered to meet the view

which I have above expressed, but in other respects the decree must stand.

Sir J. L. KNIGHT BRUCE, L. J., concurred.

1. "Earth and gravel" includes the larger stone found loose in the bank: *Hatch v. Hawkes*, 126 Mass. 177.

2. A reservation of mines and minerals in a lease, *held* not to include open limestone quarries: *Brown v. Chadwick*, 7 Irish C. L. 101.

3. "China clay" held included in a reservation of mines and minerals: *Hext v. Gill*, L. R. 7 Ch. App. 699; 3 Moak, 574.

4. Stone got from quarries is a mineral: *Micklethwaite v. Winter*, 6. Ex. 644.

5. Reservation of mines and minerals held to include everything below the surface, and the right of quarrying as well as mining: *Midland Railway Co. v. Checkley*, L. R. 4 Eq. 19.

6. What passes by a conveyance of "mines and minerals:" *Hartwell v. Camman*, 3 M. R. 229; *Griffin v. Fellows*, 8 M. R. 657.

7. Effect of use of the word "soil." *Pretty v. Solly*, 8 M. R. 301.

8. A reservation of all "minerals" does not include "oil." *Dunham v. Kirkpatrick*, 101 Pa. St. 36, 47 Am. R. 696; discarding all previous decisions to the contrary, as *Stoughton's App.*, 88 Pa. St. 198; *Thompson v. Noble*, 11 M. R. 137.

9. Coal is a mineral: *Henry v. Lowe*, 73 Mo. 96. See note, 47 Am. R. 698.

ALFORD V. BARNUM ET AL.

(45 California, 482. Supreme Court, 1873.)

¹ **Minerals must exist in available quantity.** In order that lands granted to the Central Pacific Railroad, by acts of Congress, may be classed as "mineral lands," within the clause of the grants reserving mineral lands, it must be shown that the land contains metals in quantities sufficient to render it available for mining purposes.

Parol license must be pleaded. In order to justify entry upon land for the construction of a ditch under a parol license the license must be pleaded.

. Appeal from the District Court of the Fourteenth Judicial District, County of Placer.

Action to abate a ditch as a nuisance. The complaint averred that the plaintiff, since November, 1867, had owned the northeast quarter and the northwest quarter of section twenty-nine, township fourteen north, range six east, Mount Diablo meridian, and that the defendants, in March, 1871, dug a ditch across the same, about two feet deep and three wide, and that the ditch was dug and used for mining purposes.

The defendants answered that the land was the public mineral land of the United States, and that they were mining thereon for gold.

The land was within the grant to the Central Pacific Railroad Company, and the company, prior to the excavation of the ditch, had received a patent for it, which patent excepts from its operation all "mineral lands." The plaintiff, at the time the ditch was dug, was in possession of the land under a contract of purchase from the railroad company. On the trial the defendants introduced testimony tending to show that they dug the ditch by the license of the plaintiff, and on the following day, but before the argument of the case, the defendants asked leave to amend their answer by setting up a license. The plaintiff objected, and the court sustained the objection. The plaintiff had judgment, and the defendants appealed.

The other facts are stated in the opinion.

¹ *Ab Yew v. Choate*, 1 M. R. 492.

JO. HAMILTON and B. F. MYERS, for appellants.

FELLOWS & NORTON, for respondent.

By the Court, NILES, J.

In the statement on motion for a new trial no objection is made to the findings that at the time of the alleged injuries the plaintiff was in the possession of the land described in his complaint, holding under a written contract for purchase from the Central Pacific Railroad Company, who held under grant and patent from the United States; and that the ditch dug and maintained by the defendants was injurious to the premises, and interfered with the free and full enjoyment thereof by the plaintiff.

Upon these facts it would seem that the plaintiff was entitled to recover. But it is contended by the defendants that the land in controversy was "mineral land," and so within the reservations of the act of Congress of July 1, 1862, and July 2, 1864, by which public lands were granted to the railroad company, and within the exceptions and reservations of the patent, which in this respect, follows the terms of the granting acts.

It would be a sufficient answer to this objection to say, that the character of the land, as mineral or otherwise, was directly in issue in the case, and, upon evidence substantially conflicting, the court found this issue in favor of the plaintiff. But upon an examination of the evidence we see no reason to doubt the correctness of the finding. The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose, and we can not think this was the intention of Congress.

The point that the ditch was constructed under an implied license from the plaintiff is not well taken. If the defend-

ants wished to justify their entry upon this ground they should have pleaded the license.

Judgment and order affirmed.

McLAUGHLIN V. POWELL.

(50 California, 64. Supreme Court, 1875.)

U. S. railroad reservations—Quicksilver. The court assumes, the contrary not being alleged, that lands containing cinnabar or quicksilver, are mineral lands within the meaning of the act of Congress, granting lands to the Western Pacific Railroad Co.

A railroad grant patent is admissible in evidence without first proving that the land is not mineral.

Reservation of mineral in U. S. grant. In ejectment against a defendant in possession of a portion of land described in a railroad patent, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant.

A patent which excepts from the transfer "all mineral lands, should any be found to exist in the tract described," does not convey lands which are mineral.

Appeal from the District Court, Fifteenth Judicial District, County of Contra Costa.

Ejectment to recover the northeast quarter of section 29, township number one north, of range number one, east, Mount Diablo base and meridian.

The defendant, in his answer, set up that the plaintiff claimed the land under the grant made to the Central Pacific Railroad Company of California, and that the land was mineral land, and was, by the express terms of the grant, excepted from the operation of the same. On the trial the plaintiff offered in evidence a patent from the United States to the Western Pacific Railroad Company of California, dated May 31, 1870, conveying the demanded premises as a portion of the land granted by Congress to aid in the construction of a railroad, by the act of July 1, 1862, and the act amendatory thereof, passed July 2, 1864. By the terms of said acts the grant

was limited to public land which was not mineral land, and which was not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim should not have attached at the time the line of said road should be definitely fixed. The following was the granting clause in the patent:

"Now know ye, That the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant unto the said Western Pacific Railroad Company of California, and to its assigns, the tracts of land selected as aforesaid and described in the foregoing, yet excluding and excepting from the transfer by these presents, 'all mineral lands,' should any be found to exist in the tracts described in the foregoing; but this exception and exclusion, according to the terms of the statute, shall not be construed to include iron land.

"To have and to hold the said tracts with the appurtenances unto the said Western Pacific Railroad Company of California, and to its assigns forever, with the exclusion and exception as aforesaid."

The defendant objected to the admission of the patent in evidence because it was irrelevant. The court overruled the objection. The plaintiff then deraigned title by mesne conveyances from said company, and rested. The defendant then offered to prove that the land was mineral land, containing large quantities of cinnabar and quicksilver, and that he had held the land as a mining claim since October, 1866, under the rules and regulations and customs of miners in the district where the land was situated. The plaintiff objected to the testimony as irrelevant, and the court sustained the objection.

The plaintiff recovered judgment, and the defendant appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion.

JAMES B. TOWNSEND, for appellant.

TULLY R. WISE, for respondent.

By the Court, McKINSTY, J.

It was not suggested at the argument that lands valuable because of cinnabar or quicksilver ores, are not "mineral lands" within the meaning of the act of Congress, and we shall assume that they are.

The defendant's objection to the patent, that it was "irrelevant," was properly overruled. It is not necessary to decide whether it was for the plaintiff, who relied on the patent, to prove that the land in controversy was not one of the excepted tracts, because an examination of the record shows us no motion for *nonsuit* was made.

The court below refused to permit the defendant to introduce evidence tending to prove that the land, the possession of which is sued for, was within the exception. If the plaintiff was not required to prove that the land was not within the exception, we are convinced that the defendant was entitled affirmatively to establish that it was within it.

The exception contained in the patent, introduced by the plaintiff, is part of the description, and is equivalent to an exception of all the subdivisions of land mentioned, which were "mineral" lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact can not be assumed, as by its terms the exception is limited to such as are mineral lands, and does not necessarily extend to all the tracts granted.

We think the defendant should have been allowed to prove that the demanded premises were mineral lands.

Judgment and order reversed, and cause remanded for a new trial.

1. The mere fact that land contains "copper, gold, and silver-bearing quartz," does not impress it with the character of mineral land within the meaning of the act of Congress, excluding mineral lands from the grant. Only lands valuable for mining purposes are reserved from sale. *Merrill v. Dixon*, 15 Nev. 401; *Ah Yew v. Choate*, 1 M. R. 492.

2. Under the New York constitution of 1821 the legislature was prohibited from authorizing the sale of lands owned by the State, contiguous to Salt Springs. *Newcomb v. Newcomb*, 12 N. Y. 603.

3. The act of May 3, 1852, California, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands of the State. *Nims v. Johnson*, 7 Cal. 110.

4. Although excepted out of patent (the law not requiring the exception) the patent can not be attacked collaterally, nor a mining location made upon it, when actually occupied. *Cowell v. Lammers*, 21 Fed. 200; 3 W. C. R. 504.

5. No title can be acquired to lands known to be valuable for gold, silver cinnabar or copper, under the pre-emption, homestead or town site laws. *Deffeback v. Hawk*, 115 U. S. 392.

WHITNEY ET AL. V. BUCKMAN.

(26 California, 448. Supreme Court, 1864.)

Receiver appointed to bottle the water—Receiver appointed on bill praying injunction. Plaintiff sued in ejectment for the recovery of a tract of land containing soda springs, and had a verdict. Pending motion for new trial, he filed his petition averring that the springs were of a monthly value of \$500 when the water was bottled and sold, for which purpose buildings had been erected at such springs by the plaintiff; but that defendants had cut a tunnel near the springs and just outside the plaintiff's buildings, tapping the "vein of water," resulting in its escaping, so that it became wholly wasted and of no use to either; that the defendants were insolvent, etc.; praying for an injunction; there was no prayer for a receiver. Among other things the defendants denied that the spring was embraced in the recovery. The judge refused the injunction and appointed a receiver, with directions to collect the water, bottle and sell it, and retain the proceeds: *Held*, on appeal, a proper case for a receiver, and that a receiver might be appointed without a prayer to such effect.

Order appointing receiver—When not reviewed. An order made after final judgment directing a receiver to pay over profits to the prevailing party, is a proceeding auxiliary to a suit to recover the premises, and on appeal from such an order the Supreme Court will not review the order appointing the receiver.

Property in hands of receiver—Presumptions. It is not error for a court to refuse to have issues framed and submitted to a jury to ascertain the value of property put into the hands of a receiver, and the ownership thereof. It will be presumed that the judge informed himself as to what he placed in the hands of the receiver, and it will not be presumed that the referee transcended his authority.

Appeal from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the court.

JOHN REYNOLDS, for appellant.

C. H. PARKER, for respondents.

By the Court, SAWYER, J.

Plaintiffs sued to recover one hundred and sixty acres of

land in Napa county, upon which there were certain mineral springs, well known by the name of Soda Springs, and recovered judgment. After verdict, and pending a motion for a new trial, plaintiffs filed a petition, supported by several affidavits, alleging their title to the lands, and stating that they derived title to an undivided half thereof through a sheriff's deed, in pursuance of a sale under a decree foreclosing a mortgage entered against the defendant Buckman; that they had been put in possession under a writ of assistance; that notwithstanding they had been so put in possession, the defendant had again intruded upon said lands and ousted them from possession; that they had brought this action to recover said possession, and obtained a verdict and judgment thereon; that a motion for a new trial was pending; that defendant declared his intention to appeal if said motion should be decided against him; that after plaintiffs were put in possession of said undivided half, they erected certain buildings and machinery on said premises, over and inclosing a valuable mineral spring, for the purpose of bottling the waters thereof for sale; that the waters of said spring are impregnated with certain minerals and gases imparting to them certain valuable qualities, so recognized by the community, and by reason thereof that there was a demand and ready sale for all of such waters that could be placed in market; that the said spring, for the purpose aforesaid, was of the value of five hundred dollars per month, the entire value being for purposes of sale as aforesaid; that defendant, for the purpose of harming said plaintiffs, and depriving them of the use of said waters, had cut a tunnel into the hill above the point where said waters issued from the earth, and just outside of plaintiffs' said house, tapping said vein of water, and by means thereof had turned the same down the hill, whereby it became wholly wasted and of no use to either, and thereby also rendering said plaintiffs' building and machinery for bottling of no use or value; that defendant has built a small wooden house over said place where said waters now issue from the earth, and that he pretends to appropriate said waters, but without making any use of them; that there are other valuable springs on said land besides the one last named, having buildings and machinery for bottling placed there by

plaintiffs' grantors; that the buildings and machinery are in the possession of said defendant, who is using the same, and bottling and selling the waters, and making large profits therefrom notwithstanding the said waters belong to said plaintiffs; that he is wasting the substance of the estate and wearing out the machinery; that he threatens to tear down and sever from the freehold and take away the buildings and machinery, etc., that may be left, in case plaintiffs gain this suit; that he is depriving the plaintiffs of the income which they might derive from the sale of said waters; that the defendant is insolvent and has no property out of which a judgment for damages could be satisfied; that the injuries are irreparable and such as could not be compensated in damages, etc. They pray for an injunction. An order to show cause was granted, and on the return day the defendant appeared and filed his answer to the petition, in which he admits the proceedings in foreclosure, and that plaintiffs were put in possession under the writ of assistance, as alleged, but avers that the premises in suit do not include more than one hundred and twenty acres; denies title of plaintiffs to one hundred and sixty acres, including said Soda Springs, and improvements, or to more than one hundred and twenty acres; admits the recovery in this suit, but denies that more than one hundred and twenty acres are included in the recovery; admits the erection of the building by plaintiffs, but avers that the building and the spring it covers is only partly on the lands of plaintiffs, and that the rest is on lands of defendant, not embraced in the description contained in the complaint in this suit; that the spring is not on the land of plaintiffs; admits that there are other springs, but avers that only one is on land of plaintiffs; and makes many other averments, the gist of which is, that the acts performed by defendant were not performed upon the lands described in the complaint; denies insolvency, etc. Upon the hearing, the judge thought that the interest of the parties required, and the facts justified the appointment of a receiver, to take charge of the springs, bottle and sell the waters, and retain the proceeds pending the litigation. A receiver was accordingly appointed. Subsequently, the motion for new trial having been granted, plaintiffs appealed, and the order granting

a new trial was reversed with directions to enter judgment on the verdict. After the entry of final judgment, in pursuance of the directions in the remittitur, on motion of plaintiffs, the net proceeds of the sale of soda water in the hands of the receiver, amounting to five thousand dollars, were ordered to be paid over to the plaintiffs, and this appeal is taken from said order.

We think the facts stated in the petition and affidavits were sufficient to justify the judge in appointing a receiver under section one hundred and forty-three of the Practice Act. (See also *People v. Mayor of New York*, 10 Abb. 110.)

But it is insisted that the judge erred in appointing a receiver when the application was for an injunction, and not for a receiver. The bill of exceptions shows that defendant excepted to the appointment of the receiver, but the ground of the exception is not stated. It is not shown that any objection was made on the ground that the notice did not specify that a receiver would be applied for. The necessary facts and parties were all before the court. Had the defendant been surprised, and asked for further time to meet the questions as to the propriety of appointing a receiver, doubtless the court would have given it. But it does not appear that any such desire was manifested, or that any technical objection or exception whatever was interposed, and we must presume that there was none. The judge, in the exercise of his discretion, with the necessary facts and parties before him, deeming the case a proper one for a receiver rather than an injunction, made the appointment complained of, and it is manifest that the interests of the parties were subserved by the course pursued. But whether the judge erred or not in making the appointment, without notice of an application for that specific remedy, the appellant has not appealed from the order, and it can not be reviewed on this appeal, which is only from the order directing the receiver to pay over the profits accrued from the bottling and sale of the water, pending the motion for new trial and appeal. The appointment of a receiver is not a special proceeding within the meaning of section three hundred and thirty-six of the Practice Act. (*Adams v. Wood*, 21 Cal. 165.) It is a proceeding in the suit to recover the premises, auxiliary to that action, and a part of it. It had no independent existence.

This appeal, therefore, is not from a final judgment in a special proceeding, but an appeal from an order subsequent to judgment, and on such appeal the order appointing the receiver can not be reviewed.

The defendant opposed the order to pay the money in the hands of the receiver to the plaintiffs, and moved the court to frame and submit to a referee, or a jury, issues as to the boundary of the land described in the complaint, and as to the value of any personal property, if any, in the hands of the receiver, and the ownership thereof, and what part, if any, of the money in the hands of the receiver has been earned and acquired from property belonging to the defendant, or to which he is entitled as against plaintiffs; which motion was denied, and defendant excepted, and he now alleges this ruling to be error. The receiver was appointed to take charge of the springs on the premises in controversy in the suit. We must presume that the judge informed himself as to what he placed in the hands of the receiver before he made the appointment, and we can not presume that the receiver transcended the bounds of his authority. The judgment in the suit to recover the property adjudged the recovery of "all that certain tract or parcel of land situated in said county of Napa and State of California, consisting of a pre-emption claim of one hundred and sixty acres of land, and commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging," etc. The only money in the hands of the receiver was the proceeds of the sales of the water from the "Soda Springs." As the land "embracing said springs" was recovered by the plaintiffs, it follows, as a matter of course, that they were entitled to the proceeds of the sales of the water of the springs it embraced pending the motion for new trial and the appeal. The very object of appointing the receiver was to preserve these proceeds in order that they might be delivered over to the party who should finally recover in the action. Judgment having been finally entered in favor of plaintiffs in pursuance of the direction of the court, on appeal, the order to pay over the said proceeds to them was properly made.

Let the order be affirmed.

Mr. Justice CURREY expressed no opinion.

1. The owner of "Congress Spring" held to be entitled to an injunction to restrain sellers of mineral water from appropriating the word "Congress" as descriptive of the water sold by them. *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291.

See SALINES.

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¹ AMES V. THE NEW JERSEY FRANKLINITE CO. ET AL.

(12 New Jersey Ch. 66. Court of Chancery, 1858.)

²**Ores erroneously included in mortgage.**—The New Jersey Franklinite Company executed a mortgage to the complainant on certain tracts of land and by the mistake of the scrivener, certain ores, which by the agreement of the parties should have been excepted, were embraced therein. The company conveyed the mortgaged premises, including the ores, to A. G. and others in trust, as a mortgage security for certain coupon bonds to be issued by the company. It did not appear that any bonds had been issued. The complainant filed bill of foreclosure and the trustees, by answer and cross-bill, set up mistake and claimed exemption of the ores: *Held*, that if the mistake could be set up, a cross-bill was not necessary, as the defendants would be protected by a decree upon the original bill, declaring that complainant was not entitled to have the ores sold. *But further*, that although the mortgagee obtained his lien on the ores by the mistake of the scrivener, there was no reason why he should be compelled to relinquish his security until his debt was paid.

R. HAMILTON, for complainant.

R. GREEN and I. W. SOUDDER, for defendants.

THE CHANCELLOR (WILLIAMSON.) The complainant's bill is for the foreclosure of a mortgage which covers several tracts of land in the county of Sussex. The property embraced in the mortgage, with the exception of certain ores on or within the mortgage property, were conveyed to the New Jersey Franklinite Company by the complainant. By the agreement of purchase the company were to secure a part of the purchase money upon the property conveyed to them. The mortgage in question was executed for that purpose in pursuance of the agreement. By mistake of the scrivener, it embraced not only the property which the complainant had conveyed to the company, but the *excepted ores* also, which were not conveyed by the deed, but expressly excepted in it. These *excepted ores* at that time belonged to other parties, who, after the execution of the mortgage, conveyed them to the company. The company afterward conveyed them, together with the property embraced in the complainant's mortgage, to Ashbel Green and

¹ S. C., 10 M. R. 436.

² *Roosevelt v. Dale*, 6 M. R. 377.

two others in trust, as a mortgage security for certain coupon bonds to be issued by the company, not to exceed in amount three hundred thousand dollars. The company and the trustees have answered separately. They set up in their answers, and claim that by reason of the mistake it should be decreed that the complainant's mortgage does not embrace the *excepted ores*, and that they should not be subjected to a sale to satisfy the mortgage debt. The company filed a cross-bill, praying that the mortgage might be reformed. I do not consider the cross-bill necessary. If, under the circumstances, the defendants are entitled to have the mistake corrected, there is no difficulty in accomplishing that object by a decree upon the original bill-declaring that the complainant, by reason of the mistake, is not entitled to have the property in dispute sold to pay his debt. A cross-bill was not necessary for the purpose of relief, nor was it necessary for the purpose of discovery. Before the passage of the statute, (Nixon 92, § 40,) which authorizes a defendant, after he has filed his answer, to exhibit interrogatories to the complainant, which shall be answered by him on oath, and which shall be evidence in the cause in the same manner and to the same effect as the defendant's answer to the complainant's bill, a cross-bill was necessary for the purpose of discovery, because, by a settled rule of equity, a complainant in a suit can not be examined as a witness in that suit: Story's Eq. R., § 390; *Mayor of Colchester v.*—1 P. Williams, 596. A complainant may now be examined under the act of 1849: Nixon, 887, § 22. But notwithstanding the statute, the party may still file a cross-bill if he pleases. The court, however, ought not to encourage it, as it increases the expense of litigation.

The company, as far as they are concerned, are not entitled to have the mistake corrected. The mortgage has become forfeited. The company owe the debt. Although the complainant obtained a lien upon the property through the mistake of the scrivener, there is no reason why the creditor should be compelled to relinquish his security until his debt is paid. The maxim is, he who asks equity must do equity. The company must pay their debt. That will relieve the property, and the mistake will be corrected without the intervention of this court. It is certainly more equitable that the defendant should be relieved in this way than by a decree of the court.

The trustees are not entitled to any relief. It appears, by their answer, that the mortgage was executed to them as a security for such coupon bonds as the company might issue. They do not allege that any bonds have been issued. The trustees, therefore, hold the lands as mortgagees, in trust for the company, and as I have already said, there is no ground for this court's correcting the mistake for the benefit of the company.

But even if there was a debt due secured by the mortgage, I am not clear that it would be equitable, as between the mortgage creditors, that the mistake should be corrected. The debt is due to the complainant, and it ought to be paid out of the defendants' property. If the complainant has acquired a lien, although by mistake, upon what principle is he under any obligation to release it for the benefit of the other mortgagee? The complainant's mortgage was upon record when the second mortgage was given. The creditors, those under the second mortgage, if there are any, knew of the first mortgage, and what property it covered. The record was notice. They became creditors under the second mortgage, subject to the first mortgage, as it stood upon the record. They have no equity, therefore, which is superior to that of the complainant.

The complainant is entitled to a decree and to have the mortgage premises which are embraced in his mortgage sold to pay his debt.

THE NEW JERSEY FRANKLINITE COMPANY V. AMES.

(12 New Jersey Chancery, 512. Court of Errors and Appeals, 1859.)

Ores included in mortgage by mistake—Equity. The New Jersey Franklinite Company executed a mortgage to the complainant which embraced, by mistake, as was alleged by the company, certain ores, and which, by the agreement of the parties, were to have been excepted. The company afterward conveyed the mortgaged premises, including the ores, to certain persons in trust, as a mortgage security for certain bonds to be issued by the company. It did not appear that the bonds had been actually issued. A bill of foreclosure being exhibited, the

trustees, by answer and cross-bill, set up the mistake, and claimed exemption of the ores. *Held*, that equity grants relief in cases of mistake in written instruments to prevent manifest injustice and wrong, and that if this end is not accomplished, there is no ground for relief. *Held, further*, that even if it had satisfactorily appeared that the mortgage embraced by mistake more property than the parties intended it to cover, the mortgagee could not be compelled to relinquish any part of his security.

Defendant debtors seeking equity at the hands of the court must do equity; viz., they must pay the money honestly due the complainants.

The opinion of the chancellor in this case will be found, 12 N. J. Ch. '66 (10 M. R. 434).

I. W. SCUDDER, for appellants.

R. S. HAMILTON, for respondents.

GREEN, C. J., delivered the opinion of the court.

A bill is filed by Oakes Ames to foreclose a mortgage given by the New Jersey Franklinite Company to Ames, for \$50,000. The mortgage is dated November 2, 1853. The entire principal, with a large arrear of interest, is due upon the mortgage. The defendants claim that the mortgage covers more property than it was intended to cover, and they ask that the mistake be corrected, and that part of the mortgage premises be relieved from the lien of the mortgage.

It is not clear that the mistake is established with sufficient certainty to entitle the parties, under any circumstances, to the relief asked for.

But admitting that the mistake is clearly established, ought the court now to relieve against it? Equity grants relief in cases of mistake in written instruments to *prevent manifest injustice and wrong*. If this end is not accomplished there is no ground for relief. But what injustice or wrong is to be prevented by reforming the mortgage? The mortgage is dated the 2d of November, 1853. It was given to secure to the mortgagee the payment of \$50,000, by installments, with interest from the date of the mortgage, payable semi-annually. With the exception of one semi-annual installment of interest, nothing has been paid upon the mortgage. The whole princi-

pal with an accumulation of nearly \$14,000 of interest remains due. The defendants have utterly failed to perform the contract upon their part to the great prejudice of the complainant. There is a large debt honestly due to the complainant. The property of the defendants, whether covered by the mortgage or not, ought in law and in equity to be appropriated to pay that debt. Why, then, should equity reform the contract, even though unintentionally the mortgage was made to cover more than was originally proposed? The defendants come asking equity at the hands of the court; let them then do equity by fulfilling the contract on their part.

Mere delay in seeking to reform the contract is no bar to relief where the rights of parties are not affected; but in this case the defendants suffered the security to stand upon the whole property for years, and thus held out the strongest inducement to the complainant to forbear the collection of his debt. They have gained all the advantage which the additional security in the hands of the mortgagee could afford them, and now, when he calls for payment, they ask to deprive him of that security. As between the Franklinite company and Ames, there is no equity to entitle them to a reformation of the contract, and to have their property relieved from the payment of a just debt.

But it is said that the holders of the bonds secured by the second mortgage are entitled to be relieved against the mistake. But were those bonds ever in point of fact issued? The answer of the trustees, as stated by the chancellor, does not allege that any bonds had been issued, but merely that the mortgage or deed of trust was executed to secure certain coupon bonds, not exceeding \$300,000 to be issued by the company. The answer was filed December 31, 1856, and if the bonds had then been issued to *bona fide* holders, it is remarkable that the answer should not have disclosed so material a fact. The cross-bill of the company does, indeed, state that they issued bonds, amounting in the aggregate to \$300,000, the payment of which was secured by a mortgage or deed of trust, bearing date on the 1st of September, 1855. It states when the mortgage is dated, but is entirely silent as to the time of issuing the bonds. That bill is filed on the 13th of May, 1857.

If the bonds were issued subsequent to the time of filing

the answer of the trustees they were issued *pendente lite*, and the holders could acquire no rights which did not exist at the commencement of the suit.

Nor is there any satisfactory proof that, even now, one of those bonds is in the hands of a *bona fide* holder for value. The cross-bill states that \$300,000 were then issued. The president of the company, who was examined in March, 1858, testifies that \$118 had been issued, but when issued, and whether to *bona fide* holders, does not appear.

The decree of the chancellor must be affirmed.

FIRMSTONE V. DE CAMP.

(17 New Jersey Equity, 317. Court of Chancery, 1865.)

Equity will correct a clear mistake in a written agreement so as to conform it to the understanding of the parties at the time of its execution. **Reforming contract for sale of ore.** Equity will reform a contract so as to import that the ore forming the subject of sale shall come from the mine intended by the parties at the time of the execution of the contract instead of from the mine therein described by mistake.

¹**Injunction, controlling meaning of contract at trial.** The injunction in this case modified so as to permit the defendant to proceed with his suit at law, but restraining him from setting up at the trial any other meaning of the contract than that indicated by the court.

This cause was argued on final hearing upon the pleadings and proofs, before BEASLEY, Chief Justice, sitting for the chancellor.

Mr. PITNEY, for complainant.

Mr. VANATTA, for defendant.

BEASLEY, C. J., sitting as master.

This bill is brought to reform an agreement on the ground of mistake. The agreement in question is in writing, dated the 27th of November, 1863, and signed by the complainant and defendant. Its substance is a stipulation on the part of

¹*Wilcox v. Lucas*, 3 M. R. 380.

the complainant to sell to the defendant, who agrees to buy twenty-five hundred tons of good merchantable iron ore, for a certain price, "at the Ogden mine, Sussex county, New Jersey." The alleged mistake consists in the use of the designation, "the Ogden mine."

It appears from the pleadings and proof that, at the time of the inception of the agreement, the circumstances were these: The complainant was the owner of a mine and tract of land containing thirty-two acres. This mine was then filled with water, not having been worked for some years. It was in strictness known as "the Sharp mine," though it appears the complainant had never known it, or heard it called by that name. Within about one hundred and fifty yards of this mine of the complainant, was another mine called "the Ogden mine," on a lot known as the seventy-five acre tract, which was the property of a Mr. Fell, but the mining operations upon which were carried on in the name of the complainant. Both these mines were in the same vein of ore, and there was some evidence to show that each, by some persons, was called "the Ogden mine."

The insistent of the complainant is, that in the contract in question, by the expression "at the Ogden mine," he meant to refer to his own mine on the thirty-two acre tract; whereas the defendant contends that the designation applies, and was so understood by him, to the "Ogden mine" proper, on the seventy-five acre tract.

A careful collation of the evidence has led me to the belief that the complainant has fully established his case. There are many minute facts and indications in the evidence upon which I shall not touch, as it would be tedious and unprofitable to do so, but which, nevertheless, have conduced to the formation of my opinion. A few of the more important particulars, which have had great weight with me, are these:

1. The draft of the agreement, in the handwriting of the defendant, I regard as entirely inconsistent with his present pretensions. This paper bears date on the 18th of November, 1863, and a few days after that date it was presented, by the defendant, to the complainant for his approval. This draft, like the agreement which was afterward executed, and which is now in controversy, calls for the delivery of twenty-five hundred tons of merchantable ore "at the Ogden mine."

Now the question arises, how did the defendant come to draw a contract with that provision in it? for, on the hypothesis which the defendant has endeavored to support in the proofs, I confess that to my mind this point presents an inscrutable mystery. The incongruity is here. The defendant, in his deposition, in the most explicit terms, alleges that the actual agreement between himself and the complainant was that he should have the ore taken from the mine on the thirty-two acre tract, or from that on the seventy-five acre tract. On this head he is too clear to be mistaken. Speaking of the interview between himself and the complainant, he says, "I insisted upon having the 'Ogden mine' ore, as a part of the consideration of the seventy-five acre lot at two and a half dollars per ton. He declined for a considerable time to do so, but afterward stated that himself and Mr. Fell anticipated uniting the two lots and working them in partnership, and that, when they should do so, he would represent to Mr. Fell that he had made a verbal agreement with me, to the effect that I should have the said amount of ore from *any part of the two lots* that they should be working, and that it should be good merchantable ore." This proposition, he goes on to state, was accepted by him, and this arrangement, according to his alleged understanding, was in no respect modified up to the moment when he presented himself to the complainant with the draft of the agreement in his hand. It will be observed therefore, that the verbal agreement, as stated by the defendant himself, was that the ore should come from "any part of the two lots" that should be in working, while the draft of the agreement made by the defendant confines the right of delivery to one of the two lots. It is, I think, therefore demonstrably clear, that the defendant did not frame his draft of the agreement upon the model of the understanding testified to in his deposition, and which, he would have the court believe, had undergone no change; his paper, therefore, under the defendant's own hand, bears strong evidence against the version which he now seeks to put upon the transaction.

2. But, on the other hand, this same paper strongly corroborates the case made by the bill, and by the testimony taken in the cause on the part of the complainant, I attribute this effect to it, for the reason that if we give to the expression

"at the Ogden mine," the meaning for which, the complainant contends, we have an agreement in the handwriting of the defendant, which is agreeable in every respect to that understanding which is attested to by the complainant, and which is in harmony with all the evidence, with the exception of the deposition of the defendant himself.

I have shown that the paper in question has no prototype in the arrangement between these parties, if we are to look for that arrangement in the testimony of the defendant. Let us see how it stands with respect to the opposite theory.

The complainant in his deposition thus expresses the substance of the interviews which preceded that in which the drafted agreement was brought to him. His words are: "He, the defendant, wanted five hundred tons of iron ore, and I told him I was not working my lot—I could not let him have it; that I could not start the lot to get out only five hundred tons; that if he would take twenty-five hundred tons, I would see about starting it. He then said he would consider on it, and let me know." And in a letter written by the complainant to his agent, Mr. Richards, and which is worthy of much consideration, as it shows the contemporaneous views of the writer, he states the agreement to the same effect, as follows: "De Camp was on here again, Thursday. I told him I had no intention to start the mine, and certainly should not, to get out only 500 tons. That if I did not work the mine for five years, he would get no ore at all. That if he would take 2,500 tons at \$2.50 cash, I would start the mine and take it out at the rate of 100 tons per week. He said he would let me know in a week or less." In addition to this piece of evidence, we have in the case a letter from Mr. Richards to the complainant, informing him that he had seen the defendant, who said he had concluded to accept the above mentioned offer. Those letters were not objected to before me as evidence, but were used by both parties on the argument, and they show with certainty what, at the time of the transaction, was the impression on the mind of the complainant according to this version.

Here, then, was a distinct offer of the ore to be taken from the complainant's mine, in a certain time and in a given quantity; and in a few days afterward, the defendant presents to

the complainant his draft of the agreement, which completely embodies and harmonizes with such offer, if we adopt the complainant's views touching the meaning of the denomination, "Ogden mine." Giving credence to the testimony of the complainant, and taking his definition of the terms descriptive of the mine, the draft of the defendant is a fair transcript of the agreement as attested on the side of the complainant. But if we believe the defendant, such draft contains a contract, which he, himself, does not pretend the complainant had ever assented to, at the time he committed it to paper.

In my apprehension this evidence standing alone would be almost decisive. No explanation has been offered on this point. The defendant says that in that last interview the complainant drew off the terms embodied in the final agreement, but he appears to have entirely forgotten that he, himself, had previously put in writing his own views of the understanding. What the complainant really did was to put in pencil, on the back of the draft drawn by the defendant, the form of the contract, which was a modification of that framed by the defendant, the alterations consisting principally in the times of payment and the introduction of a clause of forfeiture.

3. The testimony of Mr. Richards with regard to what took place in his presence at the interview between these parties, where they both agree the final arrangement was made, is also most material. If that evidence is true the case of the complainant is entirely established. I have looked carefully through the deposition of this witness and have found nothing which tends, in any respect, to shake my confidence in either his intelligence or veracity. His statements, in many important respects, are confirmed by the letters which are exhibits in the case.

4. I also consider the conduct of the complainant immediately following the execution of this contract as strongly indicative of the construction he put on the agreement. It is clearly shown that he proceeded at once to drain his mine and put it in working order. He gave instructions to his superintendent to let the defendant have ore from the seventy-five acre tract until the ore could be taken from the mine in his own lot. I have said these arrangements were made and instructions given as soon as the contract was executed. Why

was this course taken? Are we to believe that upon signing this agreement he immediately proceeded to take steps in fraud of it? It affirmatively appears that the complainant was under no legal obligation to enter into the agreement in question, and it seems, therefore, preposterous to attribute to him a design almost contemporaneous with the execution of such agreement, to lay measures to violate it. And yet to sustain the defense we must believe such an anomaly existed.

In view of the whole of the evidence I conclude that in the agreement or controversy the terms "Ogden mine" were intended to signify the mine on the lot of the complainant, and that they were understood in that sense by both the contracting parties. Nor, in coming to this result, have I overlooked the well settled rule of this court that in a case of this nature the proof must be clear, so as to leave the mind free from all obscurity or doubt. In my opinion the testimony before me, when carefully examined and weighed, leads the mind to this point and demonstration. Owing to the use of ambiguous terms of description, this contract, as it now stands, contains a stipulation which, at the time it was assented to, was aside from the intention of both the parties to it; and now, contrary to the justice of the case, one of such parties is endeavoring to take advantage of such verbal obscurity. It is obviously within the ordinary jurisdiction of this court to prevent such an abuse. The contract should be rectified so as to import that the ore, forming the subject of the sale, is to come from the mine upon the lot of the complainant.

The injunction should be modified, so as to permit the defendant to proceed with his suit at law, if he deems such course advisable, and restraining him from setting up at the trial any other meaning of the contract than the one above indicated.

As this case was argued on final hearing, I have no authority to sign a decree, but I hereby respectfully advise his honor, the chancellor, to make a decree in conformity with the above views.

GRYMES V. SANDERS ET AL.

(93 United States, 55. Supreme Court, 1876.)

Relief in equity from mistake. A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.

Mistake arising from negligence. Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may fairly be expected from a reasonable person.

Rescission—Waiver. Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract.

Rescission—Statu quo. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this can not be done it will give such relief only where the clearest and strongest equity imperatively demands it.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

CONWAY ROBINSON and LEIGH ROBINSON, for the appellant.

EDWIN L. STANTON and GEORGE M. DALLAS, for the appellees.

SWAYNE, Justice, delivered the opinion of the court.

The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was, on his part, any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others.

¹ *Ewing v. Sandoral M. Co.*, 110 Ill. 290; *Smith v. North Am. Co.*, 1 Nev. 423; *Post Stock*.

The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitled the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange county, Va., lying about twenty-five miles from Orange court house. The larger tract was regarded as valuable, on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above \$20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself, at the court house, upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface gold, and then took him to an abandoned shaft, which he supposed was on the premises. There Fisher examined the quartz and other *debris* lying about. But a very few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court house. Arriving too late for the train, they drove to the house of the appellant, and Fisher remained there until one o'clock that night. While Fisher was there, considerable conversation occurred between him and the appellant in relation

to the property, but it does not appear that anything was said material to either party in this controversy. Fisher proceeded to Philadelphia, and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for \$25,000. Fisher was sent to the court house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him. A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April, ensuing, the appellees paid over \$12,500 of the purchase money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depository, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first installment, paid over to the appellant \$10,000, and retained the residue on account of the compensation to which he was entitled under the contract between them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month, Lanagan and Repplier came to see the property Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary lines. Hume said he did not know where they were, and referred them to Johnson; Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises; Hume thought it was. Johnson was positive, and he was right. The appellees seemed surprised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September they sent Bowman as their agent to make the

exploration. On his way he stopped at the court house, and told the appellant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly, "that there was no shaft on the land he had sold to Repplier and Langan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation; nor did he know or have reason to believe that any such representation, had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do anything more, and left the premises. No further exploration was ever made. Johnson says: "I know the land well, and know there has been gold found upon it, and a great deal of gold, too—that is to say surface gold—but it has never been worked for vein gold. The gold that I refer to was found by the defendant, Grymes, and those that worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood mines. Before the war a bucket of ore, of from three to four gallons, taken from the latter mine, yielded \$2,400 of gold. This, however, was exceptional. In the spring of 1869 a vein was struck, from forty to fifty feet below the surface, yielding \$500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood mines, and that "the Greenwood

veins do pass through the land in controversy and some of the Melville veins do also." Speaking of Bowman and his last cut he says:

"At the place I showed him where to cut he struck a vein but just cut into the top of it; he did not go down through it or across it. From the appearance of the vein I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied that whenever a proper examination is made, gold, and a great deal of it, will be found in that vein, for it is the same vein which passes through the Greenwood mine, which was struck last spring, and yielded \$500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did anything like making a proper exploration for gold. I don't think he had more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant that, by reason of the mistakes as to the shaft, the appellees demanded the return of the purchase money which had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved: *Kerr on Mistake and Fraud*, 408; *Trigg v. Read*, 5 Humph. 529; *Jennings v. Broughton*, 17 Beav. 541; *Thompson v. Jackson*, 3 Rand. 507; *Harrod's*

Heirs v. Cowan, Hardin, 543; *Hill v. Bush*, 19 Barb. (Ark.) 522; *Jouzan v. Toulmin*, 9 Ala. 662.

Does the case in hand come within this category?

When Fisher made his examination at the shaft, it had been abandoned. This was *prima facie* proof that it was of no account. It does not appear that he thought of having an analysis made of any of the *debris* about it, nor that the *debris* indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman, under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises they said nothing about abandoning the contract, and nothing which manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says: "I can not recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Homeworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected

from a reasonable person." Kerr on Fraud and Mistake, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Shirley v. Davis*, (cited) 6 Ves. 678, the complainant being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake, there as here, was the result of the want of proper diligence. See also *Seton v. Slade*, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq., Sects. 146, 147; *Atwood v. Small*, 6 Cl. & Fin. 338; *Jennings v. Broughton*, 17 Beav. 141; *Campbell v. Ingilby*, 1 De G. & J. 405; *Garrett v. Burleson*, 25 Tex. 44; *Warner v. Daniels*, 1 Woodb. & M. 91; *Ferson v. Sanger*, Id. 139; *Lamb v. Harris*, 8 Ga. 546; *Trigg v. Read*, 5 Humph. 529; *Haywood v. Cope*, 25 Beav. 143.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value: *Thomas v. Bartow*, 48 N. Y. 200;

Flint v. Wood, 9 Hare, 622; *Jennings v. Broughton*, 5 De G., M. & G. 139; *Lloyd v. Brewster*, 4 Paige, 537; *Saratoga Co. v. Row*, 24 Wend. 74; *Minturn v. Main*, 3 Seld. 220; 7 Rob. Prac., C. 25, sec. 2, p. 432; *Campbell v. Fleming*, 1 Ad. & El. 41; Sugd. Vend. (14th Ed.) 335; *Diman v. Providence, W. & B. R. R. Co.*, 5 R. I. 130.

A court of equity is always reluctant to rescind unless the parties can be put back *in statu quo*. If this can not be done it will give such relief only where the clearest and strongest equity imperatively demandst it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and can not conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant: *Hunt v. Silk*, 5 East., 452; *Minturn v. Main*, 3 Seld. 227; *Okill v. Whittaker*, 2 Phill. 340; *Brisbane v. Davets*, 5 Taunt. 144; *Andrews v. Hancock*, 1 Brod. & B. 37; *Skyring v. Greenwood*, 4 Barn. & C. 289; *Jennings v. Broughton*, 5 De G., M. & G. 139.

The parties in dealing with the property in question stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title and nothing more. The appellees assumed the payment of the purchase money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences: *Segur v. Twigley*, 11 Conn. 142; *Haywood v. Cope*, 25 Beav. 140; *Jennings v. Broughton*, 17 Id. 232; *Atwood v. Small*, 6 Cl. & Fin. 497; *Marvin v. Bennett*, 8 Paige, 321; *Thomas v. Bartow*, 48 N. Y. 198; *Hunter v. Goudy*, 1 Ham. 451; *Halls v. Thompson*, 1 Sm. & M. 481. The bill, we have shown, can not be maintained.

In our examination of the case we have assumed that those

who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant.

Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore found it necessary to consider the question of such authority, and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative.

Decree reversed and case remanded with directions to dismiss the bill.

MAYS ET AL. v. DWIGHT ET AL.

(82 Pennsylvania State, 462. Supreme Court, 1876.)

¹Relief in equity from mistake in lease—Oil well not on the land demised.

—Dwight and Ashton leased a tract of land to Mays, with one well partly bored thereon; Mays agreed to sink this well deeper, and to pay the lessors a royalty of one fourth of the oil obtained from it. It was the understanding of both parties to the lease that this well was situated upon the tract leased; it afterward appeared that it was not within the lines of this lease, whereupon the lessees offered to deliver possession of the premises leased and refused to pay a royalty. In a bill filed by the lessors for an account of profits, the court below ordered an account: *Held*, that it was a case of mutual mistake, against which equity will relieve, and that the bill should have been dismissed.

Appeal from the Court of Common Pleas of Venango County.

This was a bill in equity filed by E. P. Dwight and Samuel K. Ashton, trustees of the Keystone Oil Company, against Henry Mays, David Ochs, J. H. Smith, Abraham Smith and H. M. Davis, for an account of the value of oil alleged to have been produced by the defendants under a lease from the plaintiffs. The answer admitted substantially the facts averred in the bill, but set up the defense which appears below.

The case was referred to a master who reported substantially the following facts. "On September 13, 1871, the

¹ *Bell v. Truit*, 8 M. R. 649.

plaintiffs made a lease, for ten years, to Henry Mays, one of the defendants, of four acres of ground, part of a tract of land in Vanango county, known as the 'Keystone property,' for oil purposes. The leased property was described in writing as follows: 'Beginning at the southeast corner of the Keystone tract, thence by land of Henry Sayers west 16 perches; thence north 40 perches; thence east 16 perches to the line of the Decatur Oil Company; thence 40 perches along that line south to the place of beginning, containing four acres, with one well thereon, partly bored, together with the engine, boiler, rig and tools; also tubing, casing, sucker rods and other appliances necessary to be used in and about said well, which may be on the said premises. The said well to be cleaned out and sunk deeper to the third sand rock by the party of the second part.'

"Mays covenanted in said lease to keep accurate books of account, showing the daily product of each well on the lease and the division and delivery of the same, and to deliver to the plaintiffs one fourth of the petroleum obtained from the land so leased, as often as once in every ten days, or oftener if required. About October 1, 1871, certain interests in this lease were purchased by the other defendants.

"In pursuance of the lease, Henry Mays and his assigns entered upon the leasehold and completed drilling the unfinished well thereon specified in the lease by sinking it about 160 feet deeper, and obtained from it 264 barrels of oil worth and averaging on the premises \$2.93 per barrel. The defendants ceased operating this well, shortly after the bringing of this suit, but commenced again some time in the winter of 1872-3. The defendants have never rendered to the plaintiffs an account of the production of said well, and have not delivered to them any oil as royalty thereon.

"Prior to the signing of said lease by Henry Mays he and the plaintiffs' agent had some negotiations between them about the lease and well. Both believed the well to be on the four acres described in the lease. The lease was prepared and sent by the plaintiffs to Mays, who signed it.

"The defendants then repaired the engine and other personal property leased, at a cost of about \$100, which repairs were necessary to their use, and sunk the well to a third sand

rock, at an additional expense of \$500, finishing it in the latter part of December, 1871.

"On September 9, 1871, Mays took a lease of ten acres of a tract of land adjoining the tract of plaintiffs from H. J. Sayers, for oil and mining purposes, (the other defendants becoming interested therein,) at a rent of one sixteenth of the oil. The two leases adjoined, and possession under both was taken the same day.

"After the defendants took possession and some time after they had been drilling at the old well, Sayers claimed that it was on the ten acres leased to Mays. Upon notice of this claim to the plaintiffs below, they caused a survey of the premises to be made, which showed that the old well was not upon the four acres leased by them to Mays. Since this survey the defendants had been paying the rent or royalty to Sayers, on his demand as their landlord. The defendants offered, after the bringing of this suit, to surrender possession to the plaintiffs of the premises mentioned in the lease of 13th September, 1871, including the engine and other personal property therein mentioned, as also to give them possession of the well referred to therein, and to pay them a suitable rent therefor. The old well was situated within the lines of the Sayers lease of ten acres."

Upon these facts the master was of opinion that the plaintiffs could not recover for oil obtained from a well situated outside of the demised premises, and reported a decree dismissing the bill.

The court below (TRUNKY, P. J.) upon exceptions to the master's report sent the case back to the master to state an account as prayed in the bill, which the master did, finding a balance due the plaintiff of \$361.76. This report was confirmed and a decree made in pursuance thereof, to which this appeal was taken by the defendants below.

KINNEN & SMILEY, for appellants.

The appellees did not present a paper book.

PAXSON, J., delivered the opinion of the court.

Perhaps no rule of law is better settled than that a tenant in possession under a lease shall not be allowed to dispute the title of his lessor. Yet this rule, like most others, has its exceptions. Where the tenant has been induced to accept the lease by misrepresentation, fraud or trick, practiced upon him by the lessor, he is not estopped from setting up a superior title to that of the lessor: *Hamilton v. Marsden*, 6 Binn, 45; *Brown v. Dysinger*, 1 Rawle, 408; *Baskin v. Seechrist*, 6 Barr, 154. It was said by Justice Bell in the last named case that, "It matters not whether the deception practiced originated in voluntary falsehood or in simple mistake, for the immunity it confers springs not so much from the fraud of the usurper as from the wrong which the deception would otherwise work upon the rights of the lessee." Here it is clear that both parties to the lease believed the well to be on the four acres described therein. The master so finds. We have then the case of a mutual mistake. It turns out that the well is upon the property of another person, who claims the rent or royalty for its use. The lessors have filed their bill in equity for an account of the oil taken from the well, the royalty for which they claim under the terms of the lease. The master finds the fact that the defendants (lessees) have offered, since the bringing of the suit, to surrender possession to the plaintiffs (lessors) of the demised premises. The court below made a decree in favor of the complainants, to which decree this appeal was taken.

We do not propose to indicate how far the matters alleged by the lessees would avail them as a defense in a proceeding at law to recover the rent under the lease. This is not such a proceeding. The lessors have invoked the aid of a court of equity. We think they have chosen the wrong tribunal. The rule that a tenant in possession can not dispute his landlord's title is not more firmly established than is the familiar principle of equity that when a contract is made under a mistake, or in ignorance of a material fact, which is of the very essence of the contract, it is voidable and relievable in equity: *Miles v. Stevens*, 3 Barr, 21; *Gibson v. Union Rolling Mill*, 3 Watts, 32; *Horbach v. Gray*, 8 Id. 492; *Geiger v. Cook*, 3 W. & S. 266; *Jenks v. Fritz*, 7 Id. 201. We have here a mutual mistake upon a matter that was of the very essence of

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the contract. It is just such cases that equity relieves against the hard rules of the common law. But, as before observed, it is the lessors who are seeking the aid of equity to enforce their contract, notwithstanding the existence of this admitted mutual error affecting the life of the contract itself. They appeal to the conscience of a chancellor to make an unconscionable decree. For, if we make the decree prayed for, it would not protect the lessees from a suit from the owner of the well for the royalty, and they would be without remedy. It needs no argument to show that these complainants have no equity. We leave them to their remedy at law.

The decree is reversed and set aside, and the bill dismissed. The costs to be paid by the appellees.

KINNEY V. CONSOLIDATED VIRGINIA MINING COMPANY
ET AL.

(4 Sawyer, 382. U. S. Circuit Court, District of California, 1877.)

Practice—Void decree. In an action by parties in possession of a mining claim against parties out of possession, brought under a Nevada Statute to determine an adverse claim, the complaint merely alleged title and possession in plaintiffs and an adverse claim by defendants, and the plaintiffs obtained a decree. At a subsequent term, a supplemental decree, purporting to be by consent, was rendered, adjudging the title to the north twenty feet of the claim to be in two of the plaintiffs, and that the title to the balance should remain the property of all the plaintiffs according to their respective rights. *Held*, that the supplemental decree was void because, 1, there was no allegation in the complaint as to the rights of one plaintiff against the others; 2, three of the co-tenants were not parties to the suit; 3, the decree was rendered after the adjournment of the term, and after the rights of the parties had been fully adjudicated.

Partition—Void decree as evidence of. A decree of court, though void for want of parties and for other reasons, if subsequently acted on, may possibly be treated as evidence of partition according to the terms of such decree.

Mistake cured by estoppel. Where parties had acted upon a certain decree, which was in fact void, whereby twenty feet on the Comstock lode had been set off as the property of the plaintiff and another, and defendant had purchased such twenty feet from the plaintiff, both parties treating the decree as valid, the plaintiff having received his price, and the defendant having, by its expenditures, greatly increased the value

of the property, there is no such mistake as a court of equity will correct. Equity will act upon the same hypothesis on which the parties have acted.

Mistake cured by counter-mistake. If the grantor of a mining claim by mistake conveys more of one part of the claim than he intended, and just as much less than he intended of another part, so that the grantee obtains the exact amount which he purchased and paid for, the equities are equal and the mistake against the grantor will not be corrected unless he reforms the mistake in his favor.

¹ **Unstamped conveyance should be reformed, not canceled—Purchase pendente lite—Possession—Notice.** K. conveyed certain interests in a mining claim to W., M. and L. by unstamped and unrecorded conveyances, who afterward, by various conveyances, good in form, conveyed the same to C. Afterward, by valid deeds duly recorded, K. conveyed all his interest in the same claim to C., who went into possession under the several conveyances. K. afterward filed a bill in equity against C. to correct an alleged mistake in the latter conveyance and *pendente lite* conveyed all his interest in said claim to parties, one of whom was his counsel of record in the cause, who were made parties to the suit by supplemental bill, but who had no actual notice of the prior unrecorded and unstamped deeds. *Held*, 1. That a correction of the alleged mistake in the deed to C. would involve a repudiation of the unstamped deeds, which would be in conflict with the rule that he who seeks equity must do equity. 2. That K. had nothing to convey *pendente lite* except the possible equity to have his conveyance to C. reformed on the ground of mistake. 3. That if K.'s grantees *pendente lite* took any equities as against his grantees under the unstamped conveyances, yet C., being a purchaser under these conveyances, had equal equities with the grantees *pendente lite*, and being in possession would not be disturbed. 4. That the purchasers *pendente lite* simply acquired the subject-matter of the suit and the decree would be the same as though the original parties remained the same. 5. That the possession of the mine by the defendants at the time of the purchase *pendente lite* was notice of whatever legal or equitable rights the defendants had.

¹ **Laches—Statu quo—Successful adventure—Refusal to accept risk.** The grantor in a deed who has sold on account of his unwillingness to pay assessments or take the risk of developing the mining ground conveyed, which mining ground, upon the expenditure of the grantee, is afterward developed into a mine of enormous value by the discovery of a bonanza, can not be heard afterward to allege in equity as late as two years after his transfer, a mistake in the deed as to the number of feet granted. And although his grantees have made immense sums out of the proceeds of the mine, it is not a case where the parties can be placed *in statu quo*, within the proper meaning of the term—a property of then unknown or little value having become, since the grant, by reason of the mining expenditures of the grantee, a mine of known and very great value.

¹ *Brainerd v. Arnold*, 8 M. R. 478.

² *Harlow v. Lake Superior Co.*, 8 M. R. 285.

Conveyance to defraud creditors—Equity. A conveyance given for the purpose of putting property beyond the reach of creditors is fraudulent, and a court of equity will leave the parties where it finds them. It will refuse the fraudulent grantor any relief founded upon the idea that the grantee holds the property thus fraudulently conveyed in trust for his benefit; and no such trust will be recognized in equity for the purpose of working out a mistake to serve as the foundation for reforming a subsequent conveyance from the grantor to parties taking through the fraudulent grantee, without notice of the fraud, and holding the property fraudulently conveyed.

¹**Conveyance of mining claim by parol.** The actual transfer of the possession of a mining claim followed by actual occupation by the transferee conveyed a good title in early days in Nevada, and this old rule will not be disturbed.

Quartz—Excludes placers. The word quartz, used in a deed of a mining claim, treated incidentally as descriptive of a lode claim, as distinguished from a placer or "surface mining" claim.

Utah Statute of Conveyances. The Statute of Conveyances of Jan. 18, 1855, Territory of Utah, did not apply to mining claims.

No such mistake as to warrant relief. Upon the whole record, *held* that there is no such mistake shown as to entitle the complainant to the relief sought at the hands of a court of equity.

Before SAWYER, Circuit Judge.

Bill in equity to reform a deed to a portion of a mining claim on the ground of mistake. Prior to April, 1872, complainant Kinney owned an interest in the mining ground then known as the Kinney ground, and the Kinney and Welton ground, within the lines of what was then the Consolidated Virginia Mining Company's claim. Some time prior to this date he had expressed a wish to defendant Heydenfeldt, that the Consolidated Virginia Mining Company would purchase his interest. The proposition was made, but declined on the ground that, at that time, the mine was being prospected by assessments without knowing whether it was valuable or not; but the company offered to take Kinney's interest and issue stock for it. This was declined on the ground that he could not pay the assessments on the stock then being levied for working the mine. In April, 1872, defendant Flood was desirous of buying in all outstanding claims to grounds within the company's lines; and among others, mentioned complainant's ground. Thereupon defendant Heydenfeldt wrote to Kinney, at Eureka, Nevada, that there was a probable op-

¹ *Copper Hill Co. v. Spencer*, 3 M. R. 267.

portunity of selling his ground. On April 7, 1872, defendant Heydenfeldt, in response to said letter, received from complainant Kinney a telegraphic dispatch as follows, to wit:

“EUREKA, April 7, 1872.

“Received at San Francisco, April 7, 1872, 7:10 P. M.

“To Hon. S. Heydenfeldt: Wrote to-day. Will send deed to-morrow; sell all I have at your own price.

“G. W. KINNEY.”

A few days thereafter, the defendant, Heydenfeldt, received from complainant a letter in words and figures as follows:

“EUREKA, Nevada, April 7, 1872.

“Hon. S. Heydenfeldt, San Francisco, Cal.—Dear Judge: Your favor of the fourth instant is received and contents noted. I own the undivided one half of the twenty feet and one tenth of a foot adjoining the Central No. 2 on the south, unincumbered. This is the ground I spoke to you about. Sunderland, when president of the consolidated company, offered me \$800 for it once for the purpose of absorbing it in the consolidated company.

“The abstract in possession of the company shows that I only own two feet (or twenty shares) in the Kinney ground, proper. There should be five (5) feet more. This five feet, as I understand it, stands in the name of Luther R. Mills (cousin of D. O. Mills). I hypothecated this amount to him once, and always thought (until I saw your abstract) that it had been properly reconveyed.

“You understand the position of things much better than I do. Act for me, Judge, as you think best. There will be no quarrel between us as to price. I have been poor too long. Not having signed the incorporation of the Virginia Consolidated Company I have paid no assessments. I do not know where L. R. Mills is, and would like to convert the shares into cash. To-morrow I will send you a deed to anything I may have on the Comstock range, and also a power of attorney, so that you can take your choice of mode of operating. Sell the ten feet in the twenty at your own price, and I will be satisfied; and also whatever your abstract allows me in the Kinney ground proper. The stage will start soon. Truly yours,

“GEO. W. KINNEY.

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"P. S. Act fully, as for yourself, and I will indorse what you do. K."

In a day or two afterward, defendant, Heydenfeldt, received from complainant another letter, in words and figures as follows :

"EUREKA, Nevada, April 8, 1872.

"Hon. S. Heydenfeldt, San Francisco, Cal.—Dear Judge : Yours of the fourth instant received and hurriedly answered yesterday. I also sent you a telegram same day. I inclose a deed to my interest in 'Kinney and Welton,' and 'Kinney' in Virginia District, and the 'Defiance' in Gold Hill District.

"This latter may be of no value to you now, but some time it may have. It was located and recorded in 1860, and lies directly in front of the Overman. The Overman Company subsequently took possession of the ground adverse to the Defiance. Before the Limitation Law of Nevada went into effect, suit was brought to recover the ground, with Quint & Hardy as attorneys. Not having been in that part of Nevada since, I do not know what became of it. The location was originally made with the assent and knowledge of Overman. Of the value of the property in Virginia district, you know much better than I do, and you are at liberty to name a reasonable price yourself, believing that you will do right by me. The consideration in the deed is left blank, for you to fill up. The segregated twenty feet adjoining the Central No. 2 is as I left it in 1865, still on the judgment-roll, No. 1010, or 1110, I forget which. A few days prior to my leaving San Francisco, you showed me the abstract of the ground within the lines of the Virginia Consolidated Company. This showed me an owner to the extent of two feet only. I stated there was five feet lost to me in some way. Mr. Thomas Wallace wrote me saying there was five feet standing in the name of L. R. Mills. I once hypothecated this amount of ground to Mills, redeemed it, and always supposed that it had been properly re-conveyed. Mills owned of his own right four feet ; but some years ago sold his interest to Frank Livingstone ; so that if any stock is in Mills' name, there is where my missing shares are.

"Welton's interest should be in my hands, as he owes me about \$1,000.

"The consideration being left blank in the deed, you will please place the proper stamps, and deduct from what is due. Nevada requires the same additional amount as Uncle Sam.

"I hope you will be able to do something for me, as my finances have been low for several years.

"Sutro's map of the Comstock was made just before the twenty feet above named was given to Welton and myself, and of course does not appear there. It would have done so, but that it was unknown then. Yours truly,

"GEO. W. KINNEY.

"Mining Recorder, Eureka District, Nev., Com. for Cal."

At the same time defendant, Heydenfeldt, also received a deed from complainant, a copy of which is hereto annexed and marked Exhibit "A:"

[Rev. Stamp, \$1.50, canceled.]

[Nevada State Stamp, \$1, canceled.]

[Nevada State Stamp, 50c. canceled.]

"This indenture, made the sixth day of April, in the year of our Lord, 1872, between Geo. W. Kinney, of Lander county, Nevada, party of the first part, and S. Heydenfeldt, of the city and county of San Francisco, State of California, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of \$1,200, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents, does remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all the following described locations, mining rights or claims, located on the Comstock lode, Virginia Mining District, Storey county, State of Nevada, to wit: The undivided one half part of the mine known as the 'Kinney and Welton;' said 'Kinney and Welton' mine consists of twenty and one tenth (20 1-10) feet on the ledge or lode, and adjoins the 'Central No. 2' mine on the south.

"Also all the interest of said party of the first part in the mine known as the 'Kinney' (amount unknown); said 'Kinney' mine adjoins the 'White and Murphy' mine on the north, and consists of fifty (50) feet on the ledge or lode; and also an undivided interest in one hundred (100) feet in the mine

known as the 'Defiance'; said 'Defiance' mine is situated in the Gold Hill Mining District, Storey county aforesaid, was located in the year 1860 by John G. Hatch, Geo. W. Kinney and others, and duly recorded in the records of said Gold Hill Mining District.

"Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

"To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

"And the party of the first part, for himself and heirs, covenants and agrees with said party of the second part that said premises are now free from all incumbrances.

"In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above written.

"(Signed)

GEO. W. KINNEY." [SEAL.]

[Duly acknowledged.]

After receiving the telegram, letters and deeds, the defendant, Heydenfeldt, bargained and sold to the said Flood the ten feet and the one twentieth of a foot of Kinney and Welton ground and two feet of Kinney ground, this being all that the abstract of title, hereinbefore mentioned, showed to be vested in the said complainant.

Heydenfeldt, by direction of Flood, on April 12, 1872, conveyed to the Consolidated Virginia Mining Company in pursuance of the sale. The descriptive part of the deed is as follows:

"All the following described locations, mining rights or claims located on the Comstock lode, Virginia Mining District,

Storey county, State of Nevada, to wit: The undivided one half part of the mine known as the 'Kinney and Welton.' Said 'Kinney and Welton' mine consists of twenty and one tenth (20 1-10) feet on the ledge or lode, and adjoins the 'Central No. 2' mine on the south. Also all the interest of said party of the first part in the mine known as the 'Kinney' (amount unknown). Said 'Kinney' mine adjoins the 'White and Murphy' mine on the north, and consists of fifty (50) feet on the ledge or lode, together with all dips, spurs and angles, rights, privileges, easements and franchises thereunto belonging or in anywise appertaining, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances."

Heydenfeldt informed Kinney of the sale of all his interest by telegraph on April 13th, and soon after received in reply a letter, as follows:

"AUSTIN, Nevada, April 24, 1872.

"Hon. S. Heydenfeldt, San Francisco, Cal.—Dear Judge: Your dispatch of the thirteenth, informing me of the sale of all the property named in my deed to you was received.

"I hoped to have received a letter from you on the subject, but so far I do not hear from you.

"To-day I have drawn on you in favor of Wallace Everson, agent of New England Mutual Life Insurance Company, for \$100 coin. Will also, in a few days, draw for about \$210, favor Edward Robinson, Santa Barbara; and also about \$25, favor California Pioneer Society. Will you write and let me know if the five feet standing in the name of L. R. Mills was sold at the same time?

"Came here yesterday as a witness in the case of *Street (Geo. Hearst) v. Lemon M. & M. Co.* Hope to get away again to Eureka soon. Yours truly,

"GEO. W. KINNEY."

Kinney afterward drew on Heydenfeldt seven several drafts

of various amounts for the purchase money which were paid ; one of date April 13th, one of May 6th, two of May 15th, two of May 17th and one of May 18th. More than two years thereafter elapsed before Kinney indicated to Heydenfeldt any dissatisfaction with the transaction. During the intermediate time the great bonanza had been developed in the Consolidated Virginia mine.

On December 10, 1874, the complainant, Kinney, filed his bill in this case which was afterward amended. In the amended bill he alleged that on the sixth day of April, 1872, he was the owner of certain mining ground described as follows:

"1. The undivided ten feet and one twentieth of one foot of ground on the Comstock ledge, so called, and in that portion thereof described as the northerly twenty feet and one tenth of a foot of a certain mining location made on the twenty-first day of September, 1859, by plaintiff, in his own name and for his own use, in Virginia Mining District, whereby he located sixty feet in extent of said ledge, commencing five hundred and fifty feet southerly from the southerly line of Comstock's claims, now known as the Ophir Silver Mining Company's ground—said premises being now known as the Kinney and Welton ground.

"2. An undivided interest of twenty-two sixtieths in all it that portion of said Comstock lode, thirty-nine feet and nine tenths of a foot in extent, lying directly south of the parcel of ground last above described.

"3. The undivided five feet and one twentieth of a foot in the portion of said Comstock lode, ten feet and one tenth of a foot in extent, lying directly south of the last mentioned portion of said lode; said second and third parcels being known as the Kinney ground."

That he applied to defendant, Heydenfeldt, to sell the same, which Heydenfeldt undertook to do; that to facilitate the transaction he executed to Heydenfeldt the deed hereinbefore set out; that the deed was executed for the purpose of enabling Heydenfeldt to sell and convey two feet undivided in the Kinney ground, and was delivered with written instructions to sell said two feet undivided in the Kinney ground; that Heydenfeldt sold to defendant Flood said two undivided feet at \$600 per foot; that in pursuance of such sale, Heyden-

feldt conveyed to the defendant, the Consolidated Virginia Mining Company, by said deed hereinbefore set out "intending by such conveyance, and said company intending, to acquire only two feet undivided in said Kinney ground;" that by said deed an apparent title was conveyed to all the interest of complainant; that said conveyance was made to include such property by mistake on the part of Heydenfeldt. A subsequent conveyance to the California Mining Company is alleged and that both of said mining companies took with notice of the mistake. The property conveyed by mistake is alleged to be worth upward of \$950,000. It is also alleged that the said two mining companies, defendants, have taken out of said mining ground so owned by complainant, and converted to their own use, ores of the value of more than \$20,000,000. He asks that he may be decreed to be the owner of the interests before mentioned in said divisions one, two and three, set out; that the mistake be corrected, and the interest reconveyed by said defendants, and for an account of the ores removed.

The answers admit the making of the conveyances set out; deny the mistake; allege the sale of what Heydenfeldt was authorized to sell, and no more; that it was intentionally done and that the sale was for full value; that the sale was made for two feet in the Kinney and ten and one-twentieth in the Kinney and Welton; that Kinney was informed of the sale of all and afterward received the purchase money without objection. Upon the coming in of the answers, and at the hearing, a part of the claim set up in the bill was abandoned by complainant, and it was admitted that the ten and one twentieth feet on the north end of the claim, called in the deed and bill the Kinney and Welton ground, and two feet undivided in the ground described in the said deed of Kinney thus: The "Kinney mine adjoins the White and Murphy mine on the north, and consists of fifty (50) feet on the ledge or lode," it being now claimed to be the fifty feet next south of the Kinney and Welton, shown in the accompanying diagram, and drawn on the diagram upon the "Mason or defendant's base" was properly conveyed. Upon this admission, there were only left for contest under the allegations of the bill the portions described in divisions two and three, before set out, to wit, the undivided twenty-two sixtieths of thirty-nine and nine tenths feet, lying next adjoin-

ing south of the said Kinney and Welton, as laid down on said diagram on Mason's base, and the undivided five and one twentieth feet of the ten and one tenth feet lying next south of the last above named piece, on the same base, the said ten and one tenth feet being the south ten and one tenth feet of the fifty feet described in Kinney's said deed to Heydenfeldt as the "Kinney mine." The aggregate of said ten and one tenth feet, thirty-nine and nine tenths feet, and ten and one tenth feet, though differently divided, constitutes the twenty and one tenth feet of the Kinney and Welton ground, and the fifty feet of the Kinney mine, as the same are described in the said deed from Kinney to Heydenfeldt, making in all seventy and one tenth feet.

On June 10, 1859, Penrod & Co., since called Comstock & Co., of whom Comstock was one, while working on a claim made by them, discovered the Comstock lode. Before that time a number of claims had been taken up in the vicinity as square locations.

On June 11, 1859, the following mining laws were adopted by the miners of Gold Hill district, which, at that time, embraced the Comstock lode:

"Article 1. There shall be elected one justice of the peace, one constable, and one recorder of this district, for the term of six months.

"(Articles 2 and 3 define duties of justice of the peace and constable.)

"Article 4. The duty of the recorder shall be to keep in a well-bound book, a record of all mining claims that may be presented for record, with the names of the parties locating or purchasing, the number of feet, where situated, and the date of location or purchase; also, return a certificate for said claim or claims.

"(Sections 1, 2, 3, 4, 5 and 6 relate to the administration of civil and criminal law.)

"Section 7. Evidence of record of claims shall be considered title in preference to claims that are not recorded, nor shall the recorder record more than one hill, dry gulch, or ravine claim, in the name of an individual, unless the same has been purchased.

"Sec. 8. All claims shall be properly defined by a stake at

each end of the claim, with the number of members forming said company, and the number of feet owned.

"Sec. 9. All claims shall be worked, or the notice renewed in sixty days from the date of record, and no claim shall exceed two hundred feet square, hill claims excepted, which may be reduced to fifty feet front.

"Sec. 10. The recorder shall be allowed the sum of twenty-five cents for recording the claim of each individual or member of a company.

"Sec. 11. No Chinaman shall be allowed to hold a claim in this district.

"Sec. 12. This district shall include all the territory from the meridian of John Town to Steamboat Valley.

"Sec. 13. All quartz claims shall not exceed three hundred feet in length, including the depths and spurs.

"Sec. 14. Any person or persons discovering a quartz vein shall be entitled to an extra claim on all veins he or they may discover.

"Sec. 15. All persons holding quartz claims shall actually work to the amount of \$15 to the share, within ninety days from the time of locating.

"Sec. 16. All persons holding quartz claims and complying with section 15, shall hold the same for the term of eighteen months as actual property.

"Sec. 17. All quartz claims shall be duly recorded within thirty days from the time of locating.

"Sec. 18. No person shall locate more than one claim on a vein discovered.

"Sec. 19. Any and all persons locating for mining purposes shall have the same duly recorded within ten days from the time of locating.

"Sec. 20. Resolved, that the above rules and regulations shall be signed by the citizens of this district, and all who may locate hereafter."

On September 14, 1859, the miners of Virginia district, embracing, at that time, the Comstock lode, adopted the following laws:

" MINING LAWS OF VIRGINIA DISTRICT.

"At a meeting of the miners of Virginia district, held at

Virginia City, September 14, 1859, the following laws were adopted for the government of the miners of said district:

"Article 1. All quartz claims hereafter located shall be two hundred feet on the lead, including all its dips and angles.

"Art. 2. All discoverers of new quartz veins shall be entitled to an additional claim for discovery.

"Art. 3. All claims shall be designated by stakes and notices at each corner.

"Art. 4. All quartz claims shall be worked to the amount of \$10, or three days' work per month to each claim, and the owner can work to the amount of \$40 as soon after the location of the claim as he may elect, which amount being worked, shall exempt him from working on said claim for six months thereafter.

"Art. 5. All quartz claims shall be designated and known by a name and in sections.

"Art. 6. All claims shall be properly recorded within ten days from the time of location.

"Art. 7. All claims recorded in the Gold Hill record and lying in Virginia district, shall be recorded free of charge in the record of Virginia district, upon presentation of a certificate from the recorder of Gold Hill district, certifying that said claims have been duly recorded in said district; and said claims shall be recorded within thirty days after the passage of this article.

"(Article 8 stricken out by the meeting.)

"Art. 9. Surface and hill claims shall be one hundred feet square, and be designated by stakes and notices at each corner.

"Art. 10. All ravine and gulch claims shall be one hundred feet in length, and in width extend from bank to bank, and be designated by a stake and notice at each end.

"Art. 11. All claims shall be worked within ten days after water can be had sufficient to work said claims.

"Art. 12. All ravine, gulch and surface claims shall be recorded within ten days after location.

Art. 13. All claims not worked according to the laws of this district shall be forfeited, and subject to re-location.

"Art. 14. There shall be a recorder elected, to hold his

office for the term of twelve months, who shall be entitled to the sum of fifty cents for each claim located and recorded.

“ Art. 15. The recorder shall keep a book with all the laws of this district written therein, which shall at all times be subject to the inspection of the miners of said district, and he is furthermore required to post in two conspicuous places a copy of the laws of said district.”

Immediately after the discovery of the Comstock lode by Penrod or Comstock & Co., claims were located for a long distance north and south, the claimants taking the south stake of Penrod & Co.'s claim, since called the South Ophir Stake, as the point of departure for their measurements, which stake has ever since been the recognized point of departure for the measurement of claims on the Comstock lode. Many, doubtless a majority of those who before had claims located as square locations, re-located their claims as ledge or lode locations under the said new mining laws adopted on June 11th. Some others continued to claim, work and hold the ledge within the bounds of their claims under their old locations. Among these prior claimants one Webb, had a claim purporting to be fifty feet front by four hundred feet deep, lying between two other claims: one on the north, now known as Central No. 2, and the other on the south, now the northern part of the White and Murphy. By whom originally, or in what precise manner located, does not distinctly appear. It seems, however, to have been a claim recognized by the miners of the vicinity.

On September 16, 1859, Webb conveyed to complainant, Kinney, one half of his said claim, by deed drawn by Kinney himself, in the following language:

“ Joseph Webb to G. W. Kinney, Sept. 16, 1859.—Know all men by these presents, that I, Joseph Webb, for and in consideration of the sum of \$200, paid to me as follows: a note for \$150, in my favor, of even tenor and date with this article, payable three months after date, and signed Geo. W. Kinney, and \$50 cash, the receipt of which I hereby acknowledge, have this day bargained and sold, and by these presents do bargain and sell to George W. Kinney, all of my right, title and interest in the undivided one half of a mining claim of quartz, or surface mining, or any mineral the claim may contain. Said mining claim is situated at the town of Ophir,

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or Virginia City, Nevada Territory, and is next adjoining the claim of Briggs, Cord & Co., on the south, and is five hundred and fifty feet distant from the mining claim known as the Comstock & Co. claim. Said mining claim is fifty feet in front, and runs back four hundred feet into the hill, all of which I warrant against any and all claims, the claim of the United States government alone excepted.

"In witness whereof I hereunto affix my hand and seal.

"JOSEPH ^{his} WEBB. [L. S.]
mark.

"Signed and delivered in the presence of A. H. Hammack, Olive Penrod.

"Ophir, N. T., September 16, 1859."

Two days after, on September 18, 1859, Webb conveyed the other half of his said claim to Jacobs and Weill, under the name of Jacobs & Co., by deed in the following language:

"Joseph Webb to H. Jacobs & Co. Know all men by these presents, that I, Joseph Webb, have this eighteenth day of September, 1859, bargained, sold, conveyed and delivered unto H. Jacobs & Co. one undivided half interest in a certain quartz claim, containing fifty feet, situated and adjoining John Bishop on the north line, and the Murphy on the south, for and in the consideration of the sum of \$200, paid in hand. Given under my hand and seal this date.

"JOS. ^{his} WEBB.
mark.

"Attest: V. A. Houseworth, Chas. D. Daggett."

Both said deeds were recorded. The said grantees of Webb took possession and worked on said claim in the manner and during the time as more fully stated in the opinion of the court. Whatever interest Jacobs and Weill had has become vested in defendants by various conveyances. And Kinney has made such conveyances as are mentioned in the opinion of the court; the interests so conveyed having also become vested in defendants by various conveyances.

On October 11, 1859, the following notice was recorded in the mining records of the district:

"CLAIM FOR MACHINERY AND RIGHT OF WAY.

"1859, October 11. H. Jacobs and G. W. Kinney claim the ground lying in front of their claims, commencing five

hundred and fifty feet south of the Comstock claims, and running thence southerly along the line of a lead known as the Comstock lead, to the south line of Webb's claim. Said claim of ground for an outlet and machinery was made on the twenty-first day of September, 1859, as per posted notice of that date.

"WILLIAM C. CAMPBELL, Recorder."

The testimony as to who caused this notice to be recorded is conflicting. Kinney denies that he had it recorded, while there is other testimony tending strongly to show that he did. The date of the claim, September 21, 1859, is the same as the date at which Kinney claims to have made a quartz claim of sixty feet, yet to be mentioned.

At the hearing it was claimed on the part of complainant that Jacobs and Weill's interest was only in a surface location, and that they had no interest whatever in the lode running through their claim; that subsequent to the said conveyances by Webb to Kinney and to Jacobs and Weill, Kinney discovered that there were sixty instead of fifty feet lying between the Central No. 2 and White and Murphy claims, and that he located this sixty feet as a lode claim in his own name and for his own use. Upon that ground he claims to have owned the whole sixty feet. In support of this claim Kinney testified that he made such a location on September 21, 1859, by putting up stakes on each side, and a notice, the substance of which he recorded for the first time some four years afterward. One or two other witnesses testified that they saw on a stake what purported to be a notice of Kinney, but they could not remember its contents. Jacobs and Weill both testified that, although often on their claim, they never saw or heard of any such notice, and never heard that Kinney claimed sixty feet for himself alone, or that he ever denied their right to one half of the fifty feet; that they never saw or heard of any notice of Kinney's except the machinery notice before set out. They admit that he claimed ten additional feet and wanted them to purchase half of that ten feet, but they declined and denied the existence of an additional ten feet. Other witnesses who were in a position to be likely to have seen Kinney's notice testify that they never saw it; and no witness except his attorney in a former suit testified to having heard

of his claim to the whole. Kinney made no record of his notice at the time, but about four years after that, on July 18, 1864, Kinney had recorded in the mining records of the district the following :

"I claim and own sixty feet of this gold and silver bearing quartz lead, known as the Comstock lead, with all its dips, spurs and angles, commencing five hundred and fifty feet south from the claims of Comstock & Co., and running southward.

GEORGE W. KINNEY.

"Virginia City, Sept. 21, 1859."

"Territory of Nevada, County of Storey, ss: This affiant, being first duly sworn, on his oath says, that on the twenty-first day of September, in the year 1859, he located sixty (60) feet of the gold and silver-bearing quartz lode, known as the Comstock lead, situated in what was then known as the Virginia Mining District, Carson County, Utah Territory; that he posted a notice on the mining ground, so as aforesaid located, which notice remained on the ground for several months, until destroyed by the rain and snow of the spring months of 1860, and that the accompanying writing is, in substance, a true copy of the aforesaid notice, and was made during the summer of the said year, 1860.

"GEORGE W. KINNEY.

"Subscribed and sworn to before me, July 18, 1864.

[SEAL.]

"GEO. E. BRICKETT,

"Notary Public, Storey Co., U. T."

[R. S., 5 cents.]

Subsequently one Welton became interested with Kinney in this mine, and upon re-measuring, he claimed to have ascertained that there were eleven feet more than sixty feet between the Central No. 2 and White and Murphy ground, and upon his suggestion, one Booth, on January 3, 1863, claimed this additional amount, which turned out to be ten and one tenth feet. He put up and recorded a notice which is as follows :

"To all whom it may concern: You will please take notice that I, the undersigned, claim eleven (11) feet of the gold and silver-bearing quartz lode known as the Comstock ledge, including all dips, spurs and angles belonging to the same, situated in this mining district, and between the ground of the

White and Murphy Co., and the sixty (60) feet owned by the Kinney Co. Said eleven feet runs nearly north and south, or along the line of said lode, and is in width, or east and west, about three hundred (300) feet, or about one hundred and fifty feet each side of the center of Stuart street.

“GEORGE A. BOOTH.

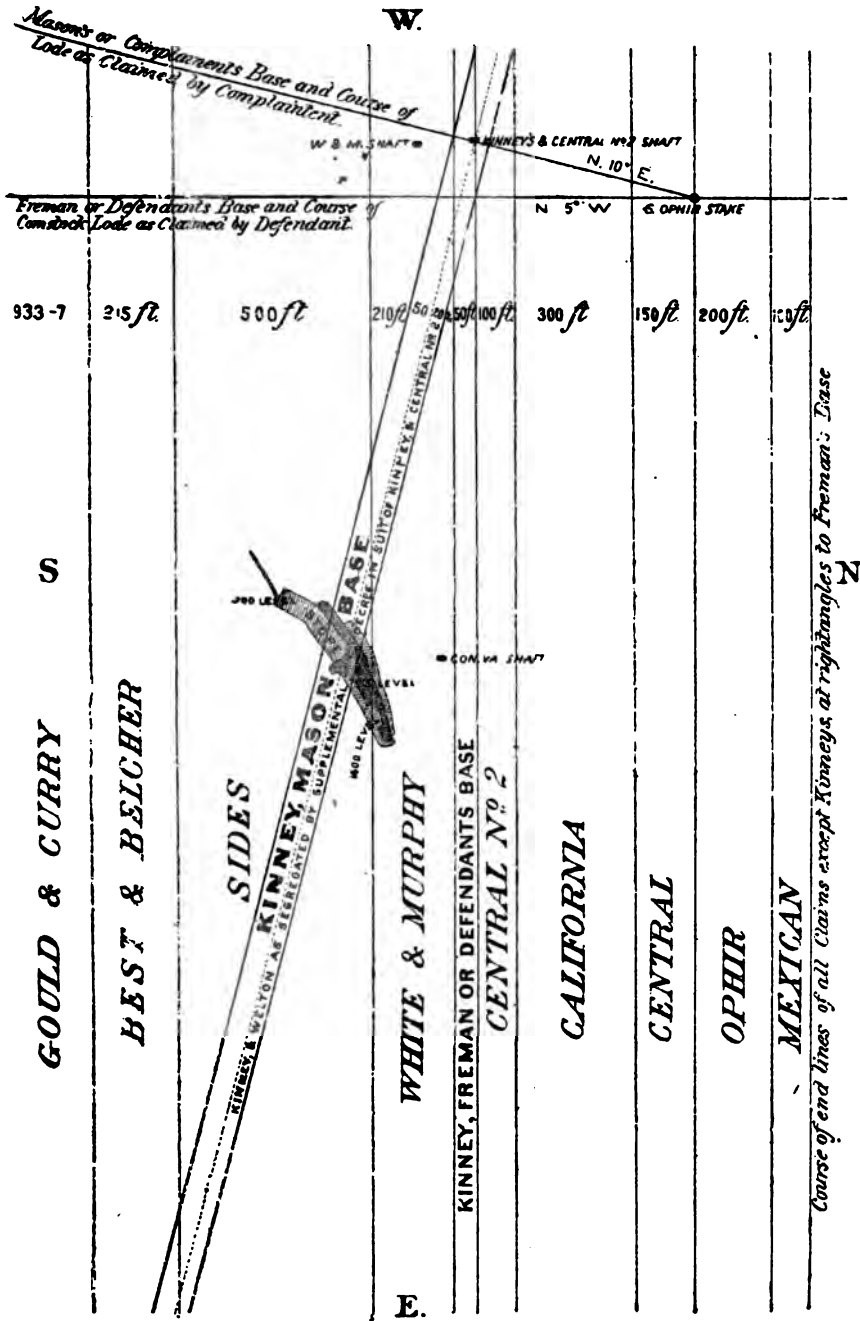
“Virginia City, January 3, 1863.

“Filed and recorded January 3, 1863.

“CHAS. H. FISH, Recorder.”

On the next day, January 4, 1863, Booth conveyed to Welton, without receiving any consideration, and afterward Welton conveyed one half of said ten and one tenth feet to Kinney. The fifty feet as the amount was originally supposed to be, the additional ten feet discovered and claimed by Kinney and the further ten and one tenth feet discovered by Welton, and claimed by Booth, making seventy and one tenth feet. The difference in the amount depends upon the base adopted for the measurements, the end lines of mining claims on quartz lodes being drawn at right angles to the general course or strike of the lode. Taking the Freeman or defendant's base in the accompanying diagram (being the base of a right angled triangle formed by said line drawn from the South Ophir stake southward, the Mason or complainant's base drawn from the same point southward and westward, and the easterly line of the White and Murphy claim), as the course or strike of the lode, and measuring southward from said South Ophir stake on the said base of the triangle, there are but fifty feet between the Central No. 2 and White and Murphy claims, as claimed by defendants. But if the measurement from the same point is made on the hypotenuse of the triangle, or Mason base, there are seventy and one tenth feet, as claimed by complainants. The complainants claimed at the hearing that the measurements should be made on the Mason base. Defendants claimed that they should be made on the Freeman base. Complainants further claimed that Kinney owned all except the half of the Booth claim of ten and one tenth feet; that Jacobs and Weill owned none; and that all the conveyances made by Kinney should be charged to the north sixty feet as measured on the Mason base, and not to the whole seventy and one tenth feet. These claims were controverted by

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defendants. On December 1, 1863, which was nearly a year after the said location of the Booth claim, a suit was commenced by Kinney's direction alone, in the name of himself, his several grantees and Jacobs and Weill, against the Central Company No. 2, the following being a copy of the complaint in the action, which was duly verified by Kinney:

"Territory of Nevada, County of Storey. In District Court, First Judicial District.

"G. W. Kinney, E. W. Welton, J. M. Douglass, L. R. Mills, S. W. Dick, M. K. Truett, M. A. Wayman, Doc Wayman, H. Jacobs, Sol. Weill, and R. Meacham, *Plaintiffs*,
v. The Central No. 2 Gold and Silver Mining Company,
Defendant.

"Now come the plaintiffs herein, by Barbour & Nougues, their attorneys, and complain of defendant, a corporation duly created, authorized and acting under and by virtue of the laws of the State of California, and for cause of complaint aver the following:

"That since the sixteenth day of September, A. D. 1859, they have been the owners, and in possession, and are now the owners and in the sole and exclusive possession of the following described mining ground and gold and silver-bearing quartz ledge, with all its dips, spurs and angles, and sufficient of the surface of the ground over and near thereto for its convenient working, situate in Virginia district, county and Territory aforesaid, and more particularly described as follows, to wit: Commencing at a point five hundred and fifty (550) feet from the south line or stake of the 'Ophir company's claim,' on the Comstock lead, and running thence on the line of the said lead sixty (6) feet to the Booth claim, and known as the Kinney ground.

"Plaintiffs aver, that being so possessed as aforesaid, and in the quiet and peaceable enjoyment thereof, that they are informed and believe, and upon such information and belief charge the same to be true, that the defendant, through its officers and agents, unjustly and unlawfully and without right, claim or pretend to claim some title or interest in and to the north twenty-one feet of said Kinney claim, and that the said wrongful and unlawful claim of defendant casts a cloud upon the title of the plaintiffs thereto, and causes great

damage to the title and interest of the said plaintiffs to the above mentioned and described premises, of sixty feet of said Comstock lead.

"Wherefore, the premises considered, plaintiffs pray that the claim and title of these plaintiffs to the said twenty-one feet of said mining ground may be confirmed by the judgment or decree of this honorable court. That the claim thereto of said defendant, and all persons claiming under it by title accruing subsequently to the commencement of this action, may, by such judgment or decree, be declared null and void, and that these plaintiffs may have and recover of said defendant their costs of this suit. And these plaintiffs further pray for such other relief or further relief, or both, in the premises, as they may be entitled to receive.

"BARBOUR & NOUGUES, Plaintiffs' Attorneys."

On March 9, 1864, this action was dismissed as to J. M. Douglass, Sol. Weill and H. Jacobs, who were plaintiffs. The suit went on as to the other plaintiffs.

Afterward, on April 26, 1865, a judgment was entered in said case by *consent* of parties, and the judgment roll filed on said day, establishing the line between said parties at the northerly line of said Kinney and Welton ground, as drawn upon the accompanying diagram, at right angles to the Mason or complainant's base, as thereon laid down; and adjudging that the defendants in said action had no right, title or interest in any part of said mine lying to the southward of said line, and that the plaintiff therein had no right, title or interest in any portions of said mine lying to the northward of said line.

Afterward, at the next succeeding term of said court, on June 27, 1865, without any further intermediate proceedings in said cause, a further judgment was entered in said cause, as follows, and a judgment roll thereof filed therein:

"G. W. Kinney and others v. Central No. 2 Gold and Silver Mining Company.

"The respective parties appearing in open court, and consenting thereto, it is hereby ordered, adjudged and decreed that the decree heretofore rendered in this case be so amended as to segregate and set apart to the plaintiffs, G. W. Kinney and E. W. Welton, twenty feet and one tenth of a foot (20.1 feet) lying south of the division line established by said decree

between the plaintiffs and defendant, and north of the line, as shown on said map attached to said decree and made a part thereof, running through the shaft marked 'Kinney and Central No. 2 shaft,' which line runs parallel with the aforesaid division line; and it is further adjudged and decreed that the other plaintiffs have no right, title or interest in said twenty feet and one tenth of a foot of ground; and that the ground lying south of said last-mentioned line shall remain the property of all the plaintiffs, according to their rights; but this decree shall not affect their rights as between themselves, but only as to the two division lines established by this and the original decree.

"It is hereby further ordered, adjudged and decreed, that the shaft marked on said map as the 'Kinney and Central No. 2 shaft,' is the common property of the Kinney company and the defendant, their respective interests to be determined by a settlement of accounts between the parties, as to the expenditures made by each in the sinking of the shaft.

"RICHARD RISING, District Judge.

"Indorsed: 1044. G. W Kinney *et al.* v. Central No. 2 Co. Modified judgment, June 27, 1865."

On May 3, 1875, pending the present action, Kinney conveyed to G. Frank Smith and A. J. Bryant, all the mining ground in the Virginia district, especially mentioning it as "known as the 'Kinney mine,' and the 'Kinney and Welton mine,'" but without mentioning the Booth claim. On December 26, 1877, on leave granted, a supplemental bill was filed, alleging the said transfer of interest *pendente lite*, and asking that Smith and Bryant be made parties, and that the same relief be granted as before prayed.

The other facts necessary to explain the points decided are sufficiently stated in the opinion of the court. The evidence, without headings and formal parts, covered over eight hundred closely printed pages.

G. FRANK SMITH, JAMES T. BOYD, and S. W. SANDERSON, for complainant.

C. J. HILLYER, R. S. MESICK and S. M. WILSON for defendants.

SAWYER, Circuit Judge, delivering an oral opinion.

Some time in the spring or summer of 1859, miners at work on the present site of the Comstock lead or lode, took up mining claims. About the tenth or eleventh of June, the Comstock company struck the lode. Immediately thereafter locations were made, covering the entire lode for a long distance, north and south. Many locations had been made before. Among others which had been made before, was a location—in what way it was made is not very fully disclosed—by a party of the name of Webb, who claimed fifty feet front by four hundred feet deep. Other locations were made immediately after the discovery of the Comstock lode in the Ophir, the claimants commencing their measurements at the south Ophir stake and locating each way, north and south. Some locations overlapped each other. There were some contests about titles among the adjoining owners, in which Webb, who was an adjoining claimant, was involved. In the final settlement, Webb's claim, whatever it was, was recognized as holding the lode. It originally purported to be a claim of fifty feet in front by four hundred feet in depth. Many of these locations were made in June, and immediately after the discovery of the lode in the present Ophir mine. Other locations had been made in the same form—square locations. Some of these parties relocated, others worked and continued on under their old locations, claiming and holding the lode thereby.

This Webb claim, down to September, was recognized by the adjoining claimants, notwithstanding the form of its location. There was some dispute between Webb and his adjoining neighbors. Some had overlapped and covered him. His claim, however, was finally recognized. On the sixteenth of September, he conveyed one half to Kinney, the complainant in this case, and the form of the conveyance is this:

“Have this day bargained and sold, and by these presents do bargain and sell, to George W. Kinney all of my right, title and interest in the undivided one half of a mining claim of *quartz or surface mining or any mineral the claim may contain*. Said mining claim is situated at the town of Ophir, or Virginia City, Nevada Territory, and is next adjoining the claim of Briggs, Cord & Co., on the south.”

This deed, the testimony shows, was drawn by Kinney him-

self, and undoubtedly so drawn with the intent to cover everything that the location could be claimed to cover, quartz as well as other minerals, and any mineral that might be found in the lode as well as on the service.

Two days after that Webb made another conveyance to Jacobs & Company, which consisted of Jacobs and Weill, and the conveyance is in this language :

"Know all men by these presents that I, Jos. Webb, have this eighteenth day of September, 1859, bargained, sold, conveyed and delivered unto H. Jacobs & Co., one undivided half interest in a certain *quartz claim* containing fifty feet, situated and adjoining John Bishop on the north line and the Murphy on the south, for and in consideration of," and so forth.

In this deed he describes it as a quartz claim. Kinney, in drawing his own conveyance, not only uses the term "quartz" but the term "mineral," doubtless, with intent to cover everything that could be claimed, so that it could be construed as covering a quartz claim. Whatever claim Webb had at this time was recognized by his neighbors, although some had located over him, on the ground that he had not located for a quartz claim; but afterward they recognized his claim. Although the claim is here called *fifty* feet, it is described as extending from Bishop (afterward Central No. 2) on the north to the Murphy claim on the south.

Immediately after these conveyances made on the sixteenth and eighteenth of September, and more than three months after the Comstock lode had been discovered, and after the said lode had been all located as quartz claims, Kinney commenced a cut in this claim, and the testimony shows—and it is uncontradicted except by Kinney—that Jacobs paid him one half of the money at the rate of \$5 per day for the work. Afterward, Jacobs became dissatisfied with the amount of work that was done, and concluded to put a man in to work his share. He accordingly hired a man by the name of Brophy, and paid him \$75 per month, and furnished him with provisions to go and work with Kinney. After working the cut for a while, they started a tunnel. The testimony is uncontradicted as to that. The testimony of Jacobs shows it; the testimony of Weill shows it; the testimony of Brophy

shows it; the testimony of several of the complainants' witnesses shows it; and Kinney does not deny the fact of his working there. They commenced running a tunnel, ran in a considerable distance, and worked there until driven out by the snows and rains in the winter, some time in December. Jacobs and Weill paid Brophy, and Kinney worked himself in person. Jacobs and Weill complained even then that Kinney did not do half the work; that he was away a great deal, and did not work all the time. Afterward, an arrangement was made with the White and Murphy Company on the south, by which a shaft was to be sunk for the purpose of prospecting the lead for the benefit of both claims. They claimed a quartz lead. Jacobs and Weill had also an interest in that claim. An arrangement was made by which they were to jointly sink a shaft on the White and Murphy ground, for the purpose of prospecting this lead, and the agreement was to divide expenses between the White and Murphy and Kinney ground, as the Webb claim was then called. Jacobs and Weill were to pay on twenty-five feet in the Kinney, and nineteen feet and a fraction in the White and Murphy. Kinney also paid on his portion of the Kinney ground. That shaft was sunk for a considerable distance, and they worked at it along through 1860 and into 1861. That Jacobs and Weill paid their share is clear from the testimony. In fact it is uncontradicted, and there are contemporaneous bills introduced showing the fact, and showing the proportion which they paid, to be twenty-five feet in the Kinney and nineteen and a fraction in the White and Murphy. There is one bill of Kinney's, also, which seems to have been made out in 1861, and about the close of their arrangements on that tunnel.

It was further testified by some of the witnesses—Skae for instance—that Kinney paid on the twenty-five feet only. It was insisted, on the other side, that he paid on a larger amount. Kinney had claimed ten feet more, which he claimed to have found there. That one bill does indicate that he paid on thirty-five feet. The bill was made out by the White and Murphy Company to Kinney. Skae says it was, doubtless, because he claimed he had thirty-five feet, and it was made out in accordance with his wish and request. There is nothing to show whether the amount of that bill bears the ratio

of thirty-five to twenty-five, or of twenty-five to twenty-five. He therefore only paid on thirty-five feet at most, while on his present theory he should have paid on sixty feet. Jacobs and Weill paid on the remaining twenty-five feet. These facts, then, clearly stand out: that there was an arrangement by which Jacobs and Weill paid on twenty-five feet, and Kinney paid on the remaining twenty-five feet, and perhaps ten feet more. The whole of the other testimony, except his own, shows that Kinney only paid on twenty-five; but that one bill indicates that he paid on thirty-five, which would be one half of the fifty feet and the ten feet which he claims to have found and located outside of the fifty feet. There is that recognition from the beginning down so far, by Kinney, of the rights of Jacobs and Weill.

Coming down a little further, in the year 1862, another arrangement was made with the Central No. 2, by which the parties sunk a joint shaft also; and the agreement established by the testimony was, as I think, that this shaft should be sunk on the line between the Central No. 2 and the Kinney—one half being on the Kinney side, and the other half on Central No. 2 side. They worked on until late in the year 1862 on that shaft and under that agreement. The agreement was to sink one hundred and fifty feet, in the ratio of one hundred feet to Central No. 2—the amount in that claim—and fifty feet to the Kinney Company; but they sunk more than that before they got through. There were drifts also from that shaft into the Kinney and other drifts in other directions. The testimony of Jacobs and Weill is, that they entered into that arrangement and paid their share of the assessments, being on twenty-five feet. Kinney, in the meantime, had sold out portions of his ground; but Kinney and his associates paid on the remainder of the claim. There is quite a large number of contemporaneous receipts for moneys paid by Jacobs and Weill on this work. Receipt after receipt was introduced in evidence—contemporaneous receipts—which support the testimony of Jacobs and Weill and others, in that matter. Those receipts are for money for assessments due on the Kinney ground, and signed “G. W. Kinney,” “George W. Kinney” and “Geo. W. Kinney,” secretary, purporting on their face to be for money for assessments upon the Kinney ground. That

shaft was sunk for the purpose of developing the lead by the two companies. Kinney, in these transactions, purports to act as secretary; to have received the money and receipted for it as secretary of the Kinney Company. These receipts for assessments continue down to late in 1862, so long, in fact, as there was really substantially any work done on this claim, except what was done by Jacobs and Weill, and somebody other than Kinney subsequently. There is one bill for labor, about which, doubtless, Weill is mistaken—the bill of Lynch. He testified that that was also on the work of the Central No. 2 tunnel. Lynch says he did not work on that tunnel, but in the White and Murphy tunnel, and the bill shows by the date that it is for work done in 1861; so that Weill must be mistaken as to that work being done in Central No. 2. It was, doubtless, for work on the White and Murphy tunnel. Weill and Jacobs testify that they never knew, during this time, that Kinney repudiated their claim. They supposed that they were recognized as owning in company with him. The men who worked on the claim, and some of the complainant's own witnesses, say that they understood that Jacobs and Kinney were in company. Their neighbors so understood it. They sometimes bounded their deeds on the "Jacobs and Kinney claim." Every one seems to have so understood it except Kinney, and there is no testimony except Kinney's—and his contemporaneous acts are against him—that he repudiated at that time the claim of Jacobs and Weill. On the contrary, Jacobs and Weill say that they did not know that Kinney denied their right. In 1863 there was a suit commenced by Wallace against the Kinney Company. In the meantime, Kinney had made a good many conveyances. That suit was commenced, and the very first defendants named are Weill and Jacobs, and then the various other defendants are named—parties to whom Kinney had in the meantime conveyed. The suit is against Sol. Weill, H. Jacobs, Doc. Wayman, Mrs. Wayman, John F. Long, J. M. Douglass, M. K. Truett, Dick, Luther R. Mills and George W. Kinney. The first defendants named in the title of the suit are Weill and Jacobs. In that suit, Wayman, Long, Douglass, Truett, Dick, Mills and Kinney answered by themselves in a joint answer. They contented themselves with denying the title of the complainant. They answered by Barbour and Bryan & Foster as their attorneys.

In the same suit Weill and Jacobs answered separately, by their separate attorneys; they not only deny the title of the complainant, but allege that they are the owners of one undivided twenty-five feet in that ground. They defended in that suit, and they testified that they paid their counsel \$2,500 at first, as a counsel fee, and that they either paid them \$1,000 or \$1,500 subsequently as counsel fee. So they made a vigorous defense. When the suit came to trial, the plaintiff failed to make out his case, and he submitted to a non-suit. A bill of costs was filed, and Jacobs and Weill's bill of costs is for \$285. George W. Kinney's bill of costs, which he signs himself, is \$123, so that it seems Jacobs and Weill sustained the brunt of that contest, and paid the larger portion of the expenses, and probably for the reason that Kinney had sold out so much of his twenty-five feet as to leave him with comparatively little interest. Soon after that suit was dismissed, in November, or a month or so, Wallace commenced another suit, and in that suit these several parties answer separately. Kinney answers separately, and in his answer in this suit he only claims *five* undivided feet. That explains the reason, doubtless, why Jacobs and Weill had the principal labor in this case—that Kinney's share had become small by prior sales. Now, the first answer Kinney verified himself in person. This answer is not verified. It is simply signed by his attorney; and it is said that this claim of only *five* feet is not an admission by him of the amount of his claim at that time, because he was not present, but his attorney, in his absence, put in this answer.

The summons was served on Kinney on November 20th, and four days afterward, on November 24th, his answer was filed; and he was there again very soon afterward, on December 1st, when he commenced his own suit, as he verified his complaint on that day. So he must have been in that neighborhood; and it is not at all likely that the answer was put in without his knowing it. At all events, his attorneys were thoroughly conversant with his case, and had examined the records for other cases, as Nougues' testimony shows, and had examined them in relation to his ownership about that time. I merely throw this out as showing that at this late date, and after they had ceased the main work on these claims, Jacobs and Weill were recognized as owners of this claim by those who were

suing the Kinney Company; that they appeared and defended, and really took the brunt of the defense on themselves, and Kinney must have been aware of it, as he was a party to the suit, and yet he says Jacobs and Weill never claimed that they had any interest in that lode. They paid a large amount of money for working and defending their claim, running through a period of more than three years. And here I will say, while I think of it, that in the White and Murphy claim the witness, Skae, who seems to have been one of the managing men, was asked by counsel what amount was spent on that tunnel; was the amount about \$2,000? And he said, yes, nearer \$10,000. Jacobs and Weill testified that they paid their share of the assessments of Central No. 2 and Kinney companies, amounting to from \$1,500 to \$2,000. And, as we have seen, they paid besides large counsel fees and expenses in defending their rights. Immediately after that, on December 1, 1863, also, after this work had been done, and while this second Wallace suit was pending, Kinney himself commenced an action against the Central Co. No. 2, and the plaintiffs therein are George W. Kinney, J. M. Douglass, L. R. Mills, S. W. Dick, M. K. Truett, M. A. Wayman, H. Jacobs, Sol. Weill and R. McEacham; but Kinney was the only man who had anything to do with commencing that suit. Nongues was then connected with Mr. Barbour as a law partner. Nongues, one of the attorneys, testifies that he knew nobody in that suit but Kinney; that Kinney represented Kinney and Welton, who were parties; that he had no interviews with anybody but Kinney, and brought the suit by Kinney's direction alone; that he had no consultation with any of the others; and he says Kinney then claimed that the others had no interest in that portion of the claim in dispute, being the northerly twenty-one feet, and this was a suit for twenty-one feet of the northerly portion of the lode, called the Kinney claim, the Booth claim being then called eleven feet. Nongues says he made them parties because he found they were all interested, as he believed from an examination of the records. He made an abstract of it, which he showed Kinney. He says he had some discussion with Kinney; that Kinney objected to their being made parties, but he insisted on it. Finally, that he consented to dismissing the case as to Douglass, Jacobs and Weill.

His recollection was, that he dismissed it as to all of those plaintiffs, except Kinney; but it turned out from an inspection of the order of dismissal, that it was only as against Douglass, Jacobs and Weill, the other complainants being left in. General Williams testified that this dismissal was on his application, and his clients were Douglass, Jacobs and Weill, and it was his only connection with the suit. He says he gave the notice himself, and a few days after the notice Kinney came to him and remonstrated with him personally, and insisted that it would not injure them, and that his clients should remain parties to the suit; that he declined, and Kinney was very much offended; and that he went in on the day when the motion was to be called up and made his motion, and there being no objection, the dismissal was had as to Jacobs, Douglass and Weill.

Now, I am satisfied on this point, that the recollection of General Williams is correct. I do not impugn the integrity of Mr. Nougues, but his recollection is defective. He testifies from his recollection, that the suit was dismissed by him as against all of them, except Kinney and Welton; that Kinney insisted that it should be dismissed as to all, and he supposed it was dismissed as to all. Now, it is not the fact that the suit was dismissed as to all the others. It was only dismissed as to Jacobs, Weill and Douglass, and these were all at that time General Williams' clients, because he answered for them in the suit commenced by Wallace a short time before. Williams could have no knowledge of it except being there on their behalf, as he had no other connection with the suit, and his recollections are that he went there, and it was dismissed, on his motion, as to his clients, and it was not in fact dismissed as to the others. So I think Nougues' recollection as to this point is mixed up with other matters, and somewhat at fault, and needs correction in this particular, as well as on the point that it was dismissed as to the whole. Williams testified that Kinney was dissatisfied, and came to him and remonstrated with him before he had the suit dismissed as to his clients, and was indignant at him for adhering to his purpose. This was as late as December—later, when this transaction of the dismissal took place. The suit was commenced in December. Soon after that Kinney left Vir-

ginia City. Weill testified that he employed a man by the name of Dougherty to sink the shaft twenty feet deeper. He testifies that he had spoken to Kinney about it, and Kinney said "go ahead," he would pay his share, but he never did pay it. He said Kinney manifested very little interest in it, as though he had but very little interest; and if he had but five feet, he had but very little interest. He said that Douglass paid, or his agent, Jones, paid for him on his part, so that he and Douglass paid all that was paid for the sinking of that shaft, and that was some time subsequent to, or in, 1863. Kinney says after he went away, he understood that Douglass had done some work there. That would confirm Weill's testimony that Douglass and Weill had been working there during his absence. Weill again testified, and it is uncontradicted, that in 1868 he also entered into a contract with another man by the name of Simpson, by which he was to run a drift some seventy-five feet, and for his compensation, Simpson was to have such quartz as he should take out; and that he did take out quartz and work there in that way. There was no work done by Kinney subsequently to 1863, unless it was done by Judge Barbour. He says he believes Judge Barbour did some work to keep up his claim. Weill's testimony is uncontradicted on that point. Taking his testimony as true, he and Jacobs were working from time to time down to 1868, and did the last work on that claim. Jacobs in the meantime sold out his claim—once sold out his entire interest in twenty-five feet—and some time after, in 1868, he repurchased it. He must, then, at that time, have had confidence in the title.

Kinney, on the contrary, claims now, that he found by actual measurements, that there were ten feet more than had been supposed and at first claimed; and on the twenty-first of September, 1859, a few days after the purchase by him and Jacobs, that he put up a notice of a claim of sixty feet, measured it off, placed his stake, and stuck his notice upon it, claiming sixty feet. He claims that the work he was doing was on that claim, and that it was a quartz claim; that the work Jacobs and Weill were doing, not denying the fact of the work, was simply on a surface claim; that they were working together in the same tunnel and in the same cut with Kinney, with the

White and Murphy, with the Central No. 2; all of whom were developing a quartz claim, except Jacobs and Weill; that Jacobs and Weill were paying their share of assessments in all these workings, and were developing nothing but a surface claim. Weill and Jacobs say that Kinney did claim an additional ten feet, and wanted them to take one half, and they declined to buy it. They insisted that there were no additional ten feet there, and that they were entitled to all the ground that there was between those two adjoining claims. Kinney now insists that he wanted to sell half of the whole sixty feet; but he says Jacobs and Weill declined to buy it, because they had all that they wanted. Now, "all they wanted" must have been either the twenty-five feet they were working and paying assessments on during those three years, or else what they had was that nineteen feet in the White and Murphy, or both. They may have referred to both or only to the Kinney ground, if any such remark was made. But they would be most likely to be talking of the claim in which they both owned. Kinney did not record his pretended notice of a claim for sixty feet. His notice was not recorded till within a month or two of four years after he claims to have taken the claim up. The mining laws, if he followed them, required him to record his notice within ten days. He never did record any notice, but only filed an affidavit stating that he had, on the twenty-first of September, 1859, put up a notice, and stated the substance of what he claimed it to be. This was in 1864, after they had ceased working on the claim, so far as the testimony indicates; that is, doing any substantial work except what was done by Jacobs and Weill. One or two witnesses testified that they saw Kinney's stake, and saw a notice; but no one testified to the contents of that notice except Kinney. What the contents of that notice were, except from Kinney's own testimony, we do not know—whether he claimed it for himself, or for himself and Jacobs and Weill. At all events, Jacobs and Weill were working with him, by employing a man and sharing the assessments; and though often on the ground, they say they never saw that notice. Kinney recognized them as owners, and collected assessments from them for working the mine, and that is against the theory that he claimed it all for himself. There was a notice for fifty feet in front of this claim

for working purposes, filed soon after the purchase by Kinney and Jacobs, bearing date September 21, 1859, the same date that Kinney claims to have taken up his sixty feet, and that purported to claim the ground for working purposes, lying in front of the Jacobs and Kinney claim, and purported to be the notice of Jacobs and Kinney. A record of the notice was made October 11, 1859. The record is as follows:

"H. Jacobs and G. W. Kinney claim the ground lying in front of their claims. Commencing five hundred and fifty feet south of the Comstock claim, and running thence southerly along the line of a lead known as the Comstock lead, to the south line of Webb's claim. Said claim of ground, for an outlet and machinery, was made on the twenty-first day of September, 1859, as per posted notice of that day."

Jacobs says he never put that record there. Weill says he never put it there. They both say Kinney told them *he did* put it there; but Kinney says he did not put it there. Now it may well be that this is the notice that Kinney put up, and which others saw, and which time and circumstances have, in Kinney's mind, transferred to a claim now set up of sixty feet on the lode. The same place would be a proper location for a stake and notice for either claim. Jacobs and Weill say they never saw any other.

The following is a resumé of the facts substantially with reference to these claims, as shown by the evidence:

Webb, and, afterward, Kinney and Jacobs & Weill in company, were recognized by all their neighbors as holding that fifty feet of ground. They were recognized by their neighbors in their dealings with them, and by bounding on them in their deeds, by the name of Jacobs and Kinney. They were recognized as the owners in company by their employes. It was generally so understood. Kinney recognized Jacobs and Weill's ownership by working along with them during the three years, the entire time that those operations were being performed, and by collecting and receipting for assessments for working the mine. Kinney, in the suit which he brought, and to which I have already alluded, dated his title from the sixteenth day of September—the date of Webb's conveyance to him—and alleged that as the date of the inception of his title. Jacobs and Weill, by their employes, worked

there as if they understood that they owned twenty-five feet; and Kinney acted as though he so understood it, and recognized them as working on the claim he was himself prospecting. Kinney worked personally some two or three months with Brophy, a man hired and paid by Jacobs and Weill. He received the money paid by them on the assessments levied to pay the expenses of working the claim, and signed the receipts as secretary of the Kinney Company. When anybody else brought a suit against the Kinney Company for the mine, they had no difficulty in bringing Jacobs and Weill in as defendants, and they seemed to take the laboring oar in the defense; and when Kinney himself brought a suit, he made them co-plaintiffs without consulting them and afterward the suit was dismissed as to them, on motion of their own counsel, because they refused to go on with the proceedings. That this was originally what is called a square location, there is no doubt; and that other claims were located in the same way, worked in the same way, and held as lode claims in the same way, there can be no doubt. That appears from the testimony in the case, and has appeared frequently in other cases on the Comstock. It has become a matter of history—both judicial and general history. I do not know but that the court, under a recent decision of the Supreme Court, ought to take judicial notice of the general and judicial historical facts of the mode of locations on the Comstock lode. At all events, the facts satisfactorily appear from the evidence without resorting to the generally known historical facts. It is too late at this day to insist that Jacobs and Weill were not the owners of those twenty-five feet. In my judgment, no candid, disinterested, impartial mind, after a thorough examination of the testimony in this case, can entertain any greater doubt that Jacobs and Weill owned twenty-five feet of this claim in question, on the Comstock lode, than that Kinney himself owned any part of that claim. The testimony is just as satisfactory and conclusive, notwithstanding the fact that Kinney now repudiates the claim, that they owned twenty-five feet of that lead, as that Kinney owned any portion of it. I take it as settled by the testimony, beyond any reasonable controversy, that Jacobs and Weill owned twenty-five feet of that lead. Wherever, on a material point, the testimony of Jacobs and Weill differs from that of Kinney, I take

the testimony of Jacobs and Weill rather than Kinney's, because it is supported by the other testimony, and is in harmony with the generally conceded facts, and such as we should expect from the condition of things, and the intrinsic probabilities of the case, as developed by the testimony.

Then how does the case stand? I shall consider it on the hypothesis that there are seventy feet and a fraction, as claimed by Kinney, but earnestly disputed by the defendants. The twenty-five feet which Jacobs and Weill had, became vested by subsequent conveyances in the corporation defendants. I shall first discuss this question with reference to Kinney alone, and afterward consider the relations of the other complainants in the case. I shall discuss it now on the theory, too, that there are seventy and a fraction feet, and on the theory that all of the conveyances are valid, and shall hereafter consider the contested conveyances. Kinney first conveyed a foot to Truett; he mortgaged five feet to Douglass; the mortgage was foreclosed, and the five feet purchased in and conveyed to Douglass by the purchaser, under the decree of the court; he conveyed ten feet to Long; he conveyed at one time four feet to Mills, and at another five feet to Mills, and at another time one foot to Mills. That makes a conveyance of twenty-six which Kinney made out of what he describes in his conveyances as the Kinney ground. He made other conveyances, but the ground conveyed thereby was reconveyed to Kinney, and requires no further notice. Now if we concede that there are seventy feet and a fraction, Jacobs and Weill had twenty-five; that left twenty-five out of the fifty to Kinney. If we concede that he took up ten feet more that would give him ten feet additional, making thirty-five feet.

Then there is another claim to which I have not referred. Perhaps I ought to have done so before this time. Welton, who had become Kinney's partner, afterward claimed to have discovered that there were ten feet and a fraction still of vacant ground there, and he procured a man by the name of Booth to locate that ten feet. That ten feet was afterward conveyed by Booth to Welton, and half of it conveyed by him to Kinney. It is ten feet and a tenth, as it is conceded by Kinney to have turned out to be according to their measurement, although located as being eleven feet. Adding five and

five hundredths feet—being half of this ten and one tenth feet—to the thirty-five feet, would give Kinney a total of forty and five hundredths feet. Deducting the twenty-six feet which he had already conveyed, leaves fourteen and five hundredths feet. On March 24, 1833, Kinney conveyed one half of all the mines he had to Welton. On this calculation he had at that time fourteen and five hundredths feet, one half of which would be seven and twenty-five one thousandths feet. He afterward, intentionally, as now conceded, conveyed twelve and five hundredths feet through Judge Heydenfeldt to the defendants, which would make forty-five and seventy-five thousandths feet in all conveyed by Kinney, being five feet and over more than he ever had. Thus Kinney conveyed five and twenty-five thousandths of a foot more than he ever had, conceding the full claim to be seventy and a fraction feet.

This claim of Booth was located and claimed on the third of January, 1863. Booth testifies in the matter. He testifies that Welton told him there was vacant ground there, and got him to assist him in the measurement, and then wanted him to take up that ten feet, and on this request he did take it up. They measured it together and put down the stakes; took it up and filed the notice; and Welton went with him to the recorder's office, and saw the notice recorded. On the next day he conveyed to Welton. He got nothing for the conveyance, but expected to get something when Welton sold it. Welton afterward conveyed one half to Kinney. Now Booth says he paid \$80 to Welton for work on that claim. There was no work shown on that claim by any of the testimony, except that \$80 paid by Booth, unless it was considered that the work on the Kinney ground was work on the Booth claim, and this transaction of Booth was after all the work was done, unless Barbour did some work, or unless the work of Jacobs and Weill and Douglass can be made to apply. He seems to be the only man who paid anything for work on the Booth claim, and it does not appear that Welton in fact did any work. He says he paid \$80 to Welton for work on that claim. Welton does not say he was paid anything, or that he did any work. Booth took the claim up on the third of January, and conveyed it to Welton on the fourth; so that Welton, according to that testimony, must have done \$80 worth of

work for Booth in the space of twenty-four hours. I place no reliance on that testimony. I do not think there was any work done. I am satisfied there was not. I am satisfied from the state of the testimony that this location was not Booth's work at all; it was Welton and Kinney's under another name. What their object was I do not know, unless they might have had some fears that if taken in their own names their associates would be entitled to share with them. Welton and Kinney seem to have been partners then. Kinney was not present, and perhaps Kinney did not know of it at the time. It may be called Welton's work, but Welton's and Kinney's interests seem to have been joined at that time, and probably the act of one was the act of the other. But on the hypothesis that the Booth claim is good, and the hypothesis that these deeds are all correct, Kinney conveyed the whole of his interest in this entire ground, and five and a fraction feet over, according to my figures.

There are two ways by which the complainants seek to avoid this result: Firstly. They claim the whole of this ground, denying the right of Jacobs and Weill to any. This claim must be rejected, and it needs no further comment. The rejection of this claim, and recognition of the right of Jacobs and Weill, should end this case. Kinney repeatedly testified, in substance, that in estimating the amount he owned at the time of his conveyance to Heydenfeldt, and for the purpose of ascertaining his remaining interest to serve as a basis of this action, he acted upon the idea that Jacobs and Weill owned nothing in the mining ground in dispute, and he indicates that if they did own twenty-five feet then he had no ground of action. It is now conceded that he intended to convey to Heydenfeldt twelve and a fraction feet. He only alleges in his bill—and he must be limited to his claim in the bill—an ownership of twenty-two sixtieths of thirty-nine and one tenth feet, being fourteen and sixty-three hundredths feet, and an undivided five and one twentieth feet, making an aggregate of nineteen and sixty-eight hundredths feet. This is all he claims to own by the allegations of his bill, besides the twelve and a fraction feet, which he now admits was intentionally conveyed to Heydenfeldt; and this claim is based, as he concedes, on the idea that he owned the whole fifty feet

of the lode derived through Webb, and that Jacobs and Weill owned none. Since it turns out that Jacobs and Weill did own twenty-five feet, this amount must be deducted from the basis of his claim, and twenty-five feet is five and thirty-two hundredths feet more than the nineteen and sixty-eight hundredths feet alleged in his bill as the amount owned by him, which excess corresponds very nearly with the excess he appears, by his deeds, to have conveyed more than he ever owned. Upon Kinney's own theory, then, as distinctly disclosed in his testimony when compared with the allegations of the bill, if Jacobs and Weill owned twenty-five feet, he has no ground of action; but, on the contrary, he really had more than five feet less than he had in some way assumed to dispose of.

Secondly. They claim to avoid the effect of these facts in another mode; they claim that Kinney's conveyances must all be credited to the northern sixty feet; that is what he calls the Kinney ground at that time. The testimony, all except in one particular instance, indicates that Kinney regarded the additional feet as on the south side; there is one point which leaves it in doubt whether he intended the extra ten feet located by Kinney to be on the north or south. But on page 781 of the testimony he locates it on the south. Booth took his up on the south, and Kinney says he took up the whole sixty feet commencing on the north and ending on the south. Which end he now claims the ten feet to be on does not very clearly appear. It would naturally be on the south, as the Ophir stake appears to have been the point from which all measurements were made. I do not know what right he had to select his ground. The other parties, Jacobs and Weill, claimed the whole from claim to claim adjoining—that there were no extra ten feet there. There was a stake on the White and Murphy line and a stake on Central No. 2 line. If it was a case of a deed describing ground as commencing at one stake and running thence fifty feet to another stake, where the deeds fixed the monuments, and it turned out that there were more than fifty feet between the monuments, the whole would be conveyed by the deeds from monument to monument. The deed from Webb to Jacobs & Co. described the claim conveyed as extending from the adjoining claim on the north

to the Murphy on the south. The parties were there in possession, from one claim to the other. It is true they called it fifty feet, but there was a stake on either side marking the boundaries of the adjoining claims; and the claim was admitted by outside parties, at a time, too, when people were looking for vacant ground. If Kinney could locate thus and locate his partners out of the ground, I do not know how, or by what authority he could select the place where he would take his ten feet. His associates, certainly, would have something to say about that. At all events, that is the way the claim stands.

Kinney evidently, in all his conveyances, referred to the whole ground as the Kinney ground, but they were made before the Booth location. That is doubtless so; but later, from some time in 1865, it has been assumed by Kinney that there has been a partition or segregation by which twenty and a fraction feet were cut off from the northern end and segregated to Kinney and Welton; and which they have since claimed in severalty, and they have named this segregated twenty and a fraction feet the "Kinney and Welton claim," and all the rest, including the Booth location, the "Kinney ground." All except the north twenty and one-tenth feet is called the Kinney ground in the deed in question to Heydenfeldt. Now as to the suit of *Kinney v. Central No. 2 Company*. Kinney and everybody else, ever since the judgment in that action, appear to have acted upon this assumption. Kinney and Welton claimed the whole of that twenty and a fraction feet. By what means do they get that twenty and a fraction feet in severalty? It must be by a transfer of the Booth claim on the south, and the other ten feet which Kinney claimed to have found and located to the northern end of the claim by some means. The amount corresponds to the amount of those two claims. There is no conveyance shown in evidence, either written or verbal. There is no means indicated in the evidence by which they got that segregated except by an addendum to the judgment in the case which Kinney brought against Central No. 2, in which Douglass, Jacobs and Weill refused to be joined and were dismissed.

After their dismissal, a decree was entered in that case by

which a line was estab'lished between the Central No. 2 and the remaining plaintiffs in the case. Some two or three months after that there was a supplemental decree appended to the other after the adjournment of the term, in which it is adjudged and decreed that Kinney and Welton owned that twenty and a fraction feet on the northern end in severalty; that the other plaintiffs had no right therein; and that the remaining portion to the south should remain the property of all the plaintiffs according to their rights. That purports to be a decree by consent. One of the complainants' counsel seems to regard that as a valid decree, and as in evidence and as having some effect; while the other repudiates the validity of that decree. It was objected to by him as evidence on the ground that the supplemental decree is wholly void, and therefore irrelevant. I am inclined to think that it is void as a decree. I take that view of it as a decree of the court. In the first place, there is not an allegation in the complaint upon which the decree could be based; there is no allegation at all on the subject, except that the plaintiffs are owners of the mining ground, and the defendants are not, and seeking to settle the title of the defendants therein. There is no allegation as to the rights of one plaintiff against the others anywhere in the complaint. Nothing is there shown on which the decree could be based. In the second place, Jacobs and Weill and Douglass were not parties to it; they were tenants in common, and had an interest. Their consent was necessary to affect their rights. Another ground, and the main ground that was relied on, is that it was entered after the adjournment for the term; after the rights of the parties had been finally adjudicated; after the case had been closed, and the record finally made up; and that the court was not authorized to make a further decree for want of jurisdiction. If that is so, there is no possible way shown by the evidence by which Kinney and Welton got their interest transferred in severalty to those northern twenty feet, unless this decree, though void as a decree, can be regarded as a partition by consent. It may perhaps be regarded as an admission of the parties to the suit entered on the record by which those who were parties consented to a partition. That decree is the only act Kinney relies on to show a segregation, notwithstanding the fact that he objects

to its introduction as invalid. From that time forward he claimed it for himself and Welton in severalty. In his letter to Heydenfeldt he claimed it in severalty, and refers to it as having been obtained by virtue of that decree, for no other is shown, and that his interest remains in the same position as that in which this decree left it; that he had done nothing with it since. He treated this segregated part as belonging to him and Welton. He claimed to own an undivided half of it, and he claimed it by virtue of that decree. He sold Heydenfeldt ten feet and one twentieth of a foot in it—in other words, one half of it. He admits that he sold that amount and got his pay for it in this very transaction which he seeks to have reviewed—the transaction which he seeks to have declared to have been entered into by mistake, which mistake he now asks to have corrected. Welton claimed the other half. He must have got it through that decree as a decree, or by virtue of that stipulation upon the record regarded as an agreement for partition, or as evidence of a prior parol partition, or so far as the testimony is concerned he did not get it at all. It may be looked on perhaps as something in the nature of an agreement for partition between those plaintiffs. It does not appear whether the attorneys or parties in person consented. It might be said to be by consent of the parties. If by consent of the attorney, and he had no authority, Kinney has still recognized it, because he has ever since claimed under it, and there is no other way shown in the testimony by which he and Welton could have got these twenty feet in severalty. Even if he took his own ten extra feet, there on the north, he could not transfer the Booth ten feet to that end of the claim. And subsequently to that time he considered the Booth claim as a part of the Kinney ground, for he describes it as such in the very deed in question. If we consider it as an agreement for partition, or as evidence of a prior parol partition between him, Welton and the other plaintiffs, by which they set off that portion to him, and the others acquiesced, and possession was taken in accordance with this agreement; it also at the same time transferred the right of his prior grantees in the whole to the remaining part. Such would be the effect of the partition, and his deeds of conveyance should be credited to the remaining part. When he took the interest of the

others in the north twenty and one tenth feet by that partition, or by decree, or by whatever means he got it, he must have yielded his right to a corresponding amount in the remaining part to the others in order to make the partition as it should be. The whole southern fifty feet he thenceforth treated as the Kinney ground. Then taken in that view the several conveyances of Kinney should be applied to the other part.

But his present theory goes beyond that even ; he now, for the first time, so far as the evidence shows, claims the twenty and a fraction feet on the north, and besides claims half of the ten feet of Booth ground on the south. That would be eighty feet and a fraction instead of seventy, because he got this segregated twenty feet by some sort of partition. Certainly, he has not claimed the ground as eighty feet, and it is only by that process that he can get the ten feet in there in addition to the twenty and one tenth feet on the north. He must either have transferred that Booth ten feet to the north end, or else he has not got a title to that twenty and a fraction feet on the north. He then, himself, by his acts, recognized those conveyances as being transferred and passed over to the other portion of his claim, and claimed his several interests in the northern twenty feet. He has acted on that theory ever since. He acted on it in the conveyance in question, to Heydenfeldt. He admits now that it is shown by the conveyance that he did convey, and intended to convey ten and a fraction feet of the Kinney and Welton ground to Heydenfeldt, and got his pay for it. Now, if he did that, and these conveyances are to be credited to the whole northern sixty feet, then he has sold to Heydenfeldt ten and one twentieth feet which he did not own, or at least a large portion of it. If there has been no partition in setting that off in severalty, he did not have that ten and a half feet to sell, because, on his present theory, these conveyances affected the whole northern sixty feet. If that is so, he had no ten and a fraction feet to sell in that part, and Heydenfeldt and the Consolidated Virginia and California Companies have a counter claim for the correction of the mistake in that particular, and a claim to get the ground which they have bought and paid for out of the ground which Kinney did in fact own. It makes very little difference, I apprehend, which way it goes. Somebody is wronged upon

that theory—upon the theory that the whole of his conveyances are to be credited to the northern sixty feet, while the whole northern twenty and one tenth feet are owned by him and Welton in severalty. On that theory, somebody has been wronged, and that somebody is the defendants, because the defendants have bought and paid for the full number of feet that Kinney ever owned in the whole seventy and one tenth feet, and bought it of Kinney and his grantees. That is shown by the testimony. The testimony shows that they had bought from Kinney and his grantees the full amount of Kinney's portion of seventy and a fraction feet—as much of said lode as Kinney ever owned. So that if anybody is wronged by that claim it is the defendants, and they are wronged by Kinney ; and the defendants have counter-right to a correction of the mistake as against Kinney, so as to get their full number of feet purchased through Kinney, somewhere in these claims.

It is apparent that Kinney and Welton, and Kinney's grantees, who were co-plaintiffs in the Central suit, including the defendants, their successors in interest, who are also the grantees of Jacobs and Weill, have acted, and that Kinney and defendants have acted in this transaction upon the idea that there was a partition made by virtue of the supplemental decree in the Central suit, by which the northern twenty and one tenth feet were segregated and set off to Kinney and Welton, and the remaining fifty feet constituting the Kinney ground, left to be held in common, thereby referring Kinney's previous conveyances to that portion. The parties to the deeds sought to be reformed, Kinney and defendants, acted upon that hypothesis in this very transaction. And it can not be successfully claimed that Kinney in adopting this hypothesis, acted under any mistake of fact. In no other way indicated by the evidence could Kinney have ten and a fraction feet in the Kinney and Welton ground to convey to Heydenfeldt. And equity requires that the court should act upon the same hypothesis, as this is the only one upon which defendants can obtain all the interests which they have, in good faith, bought from Kinney and his grantees and paid for, and the only ground upon which full justice can be done between these parties ; and upon this hypothesis there is no mistake

against Kinney. Upon that ground, then, there is no mistake, in my judgment, which ought to be corrected by a court of equity, and the equities are with the defendants.

The case stands thus: Kinney never had but forty and five one-hundredths feet, allowing and including the ten extra feet claimed to have been located by himself, and half of the ten and one tenth feet claimed to have been found and located by Booth, the remaining twenty-five feet being owned by Jacobs and Weill. He conveyed forty-five and seventy-five one-thousandths feet, being five and twenty-five one-thousandths feet more than he ever owned. Defendants have purchased and received conveyances from Kinney and his grantees, including in Kinney's direct conveyance only the amount which Kinney admits he intended to convey by the deed in question, forty and five one-thousandths feet, being all he ever owned, five feet from Welton, which would embrace the other half of the Booth claim, and twenty-five feet from Jacobs and Weill, making the whole seventy-five and five one-thousandths feet.

If Kinney has made a mistake, and conveyed more than he intended in the Kinney ground, he has, also, made a counter-mistake in conveying a corresponding amount more than he owned in the Kinney and Welton, and if he asks equity by correcting one mistake against him, he should do equity by correcting the other in his favor and against the defendants. The legal title and possession are in defendants. The equities, at least, are equal in their favor, if not better, on that hypothesis. Where the equities are equal, the one in possession stands in the better position. On that ground, I think that deed should not be corrected, because, if Kinney has made to defendants conveyances of more than he intended in the south fifty feet, he has conveyed an equal amount more than he owned in the northern twenty feet. That is to say, the court will not reform this instrument for the purpose of giving him those advantages which he claims, if he has fallen into them by mistake. If defendants got no more than they bought and paid for, and bought and paid for through him, there certainly is no ground for a reformation of the instrument on that theory, even though they did not get it in the precise way contemplated.

We now come to the contested conveyances. There are three contested conveyances; the conveyance from Kinney to Welton of one half of the ten and a fraction feet claimed to have been located by Booth, executed at the time when it was necessary that the deed should be stamped, and there was no stamp on it. It has not been stamped, and the counsel could not find any authority for stamping it at this time; another one to Mills of one foot, is in the same condition. I think there are two answers to the objections taken. I will take the Kinney deed, because it is larger. There are two answers to the claim of the plaintiff on that point. The first is that the statute provided that where a party received a conveyance that was duly stamped, his right should be in no way affected by any prior conveyance that was not stamped. The statute did not make the instrument absolutely void. It simply meant to put a disability on the use of the instrument as an instrument of evidence as between the parties to it. It made it a penalty for any person to issue or execute an instrument without stamping it, and for the purpose of insuring payment of this stamp tax, it made the instrument inadmissible as evidence, and also provided that its record should not impart notice to subsequent purchasers, but as the law was simply meant to operate on the parties to the transaction who ought to have stamped it, it was provided that a subsequent conveyance to a party by a deed properly stamped, should not be affected by a defect in the prior transfer. That being so, these defendants acquired title by subsequent conveyances which were stamped, and in all respects lawful, and which passed the title to them as purchasers unaffected by the want of stamps on previous conveyances, and they have the protection of the statute on that point. But I do not know how the complainant gets over the point, as to his own deed. The prior deed from Booth to Welton was not stamped. It is not necessary to attach any consequence to this defect, and I only refer to it. The deed from Booth to Welton of that ten feet was not stamped, and stands in the same condition as the other. I do not know that there is any law which authorizes the complainants to stamp their deed, which does not authorize the defendants to stamp theirs. It is, however, unnecessary to lay any stress upon that point, but

it is the fact that the deed of Booth was not stamped until after this action was commenced, and since this testimony was mostly taken ; and it is claimed that there is no law now authorizing it to be stamped ; and that there has not been a law authorizing unstamped instruments to be stamped since the first of January, 1877. But that is not a matter of importance to this controversy. On the theory I adopt, if the deed from Welton to Kinney is not stamped, it is Kinney's fault and Welton's fault. They were the parties to it, and conveyances have been made by both those parties since to defendants, and valid conveyances have been made to defendants by the grantees in the unstamped deeds.

Kinney sold his mining ground to parties through whom defendants derive title, and got his consideration for it ; if he failed to make a valid conveyance, equity required that he should make a good conveyance. It was his duty to make one, and thereby perfect the title of defendants derived through him by the unstamped deed. It is no more than he ought to do to perfect that deed, and I see no reason why a court of equity would not compel an execution of a valid deed, or the perfecting of the deeds already executed by stamping it, so long as the law permits the stamp to be put on. If so, he has done nothing more than he should have done, and what a court of equity would have compelled him to do. But it is claimed that the deed, which, though executed for another purpose, happens to cure the defects of his prior conveyances, was executed by mistake, and he asks that the mistake may be corrected, and in order to enable him to make out the mistake relied on, he asks the court to permit him to repudiate his former defective conveyances. He comes into court, and asks affirmative relief on this ground. A man who comes into a court of equity asking equity, must do equity, and equity would require him to perfect that title, and will not correct a mistake for the purpose of allowing him to avail himself of his own wrong in failing to stamp that deed, and in declining to give effect to the sale which he made, and for which he received his consideration.

The same observations will apply to the Mills deed. I will not go over the point again, but will only say that Kinney is not entitled to a decree to reform his deed, for the purpose of

enabling him to take advantage of his own wrong in neglecting to stamp a former conveyance under which the defendants in part claimed title. On both of these grounds, therefore, the objection to allowing the Welton and the Mills deeds must be overruled.

The next is the Long deed. The Long deed is a deed of ten feet, executed in 1861. That deed was executed, witnessed and acknowledged, but was not recorded. It is unnecessary to discuss the validity of this deed with reference to Kinney. The complainants do not even claim that the deed is not good as against him, except under a statute of Utah, which I have held heretofore, and which I shall continue to hold until overruled, did not apply to mining claims. They have not made a very earnest stand on that point as to Kinney, and unless void by the statute, they admit that the deed as to Kinney was valid, but deny its validity with reference to the other two complainants, who have acquired their interests since the commencement of this suit. They do claim, however, that it was given only in trust.

I may as well go over this part of the case in this connection, now I have it in my mind. This deed was executed some time in October, 1861. Kinney says that it was not intended for a conveyance—that he only put it in Long's name to avoid his creditors, and that Long so understood it. He did not record it. He did not even acknowledge it until several months after it was given, but even then, the deed was not recorded so as to make it a protection. That is the only ground on which he puts the question as to that deed. He says, however, that he had ample property besides left, out of which the judgment which he was seeking to avoid—a judgment for some two hundred dollars from Placerville—could have been collected. That his other interest in the same claims was ample to pay that. This conveyance, therefore, was needless, for it would not accomplish his purpose, if that was his purpose, as he had an abundance of property left to satisfy this demand. A portion of the same mining claim was left amply sufficient to satisfy this demand. Besides, he acknowledged it several months after it was given, showing that he intended at that date to give it effect. Upon this theory it was given for a fraudulent purpose, and passed the legal title.

In such cases a court of equity will, doubtless, leave him where it finds him. The pretense seems to be preposterous on that state of facts, but in addition to that, Long immediately sold five feet to Douglass and five feet to Mrs. Ormsby, afterward Mrs. Wayman; their deeds were on record, and they were recognized afterward by Kinney as members of the Kinney company. It was a fact that must have been notorious, and well known to him, because when Wallace brought the first suit against the Kinney company to recover this ground, he made Long, Douglass and Mrs. Wayman parties, and afterward, in the second suit, he made Douglass and Mrs. Wayman, as well as Kinney parties. It must have been notorious, for when the parties desired to sue the Kinney company, they had no difficulty in finding out who owned the ground. Douglass, Mrs. Wayman and Kinney were defendants in the same suit. Kinney filed an answer, for himself, Douglass, Mrs. Wayman *et al.*, and verified it, and in the verification he stated that he had read the answer and knew its contents. He must have known, therefore, that Long and Douglass and Mrs. Wayman, were parties to it. Not only did he know it, but others desiring to deal with the company knew it.

The suit was *Wallace v. Sol. Weill, H. Jacobs, J. W. Wayman, John F. Long, J. M. Douglass et al.* And now come the above defendants, J. W. Wayman, Wayman, Long, Douglass, Truett, Dick, Miles, George W. Kinney, and answer all in one answer. Kinney verifies it. He being "one of the defendants above named, being duly sworn deposes and says: That he has heard the foregoing answer read, and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated on his information and belief, and as to those matters he believes it to be true." It is signed George W. Kinney. They were, therefore, parties to the same suit, and he answers for them all, and says he has read the answer, and knows what it contains, and has verified it. There are no other means shown by which Mrs. Wayman and Douglass as to a part obtained any title, except through that deed to Long. Kinney knew, then, that Long had conveyed it to Douglass and Mrs. Wayman. What is more, in the same suit, before they came to the trial, there was a stipulation filed by which Long's right was to be pro-

tected, and another stipulation in the case is that the interest of Douglass is to be protected, and that the interest so to be protected came from Long; and Long is not shown to have had any other right than that which came from Kinney. There is a recognition of these rights again by Kinney, when Kinney brought his suit against Central No. 2. In that suit he made Douglass and Mrs. Wayman parties as co-plaintiffs, thereby recognizing their rights subsequently to this Wallace suit. There is no ground, therefore, for rejecting that deed, because it was not intended for a conveyance. But if it was intended for the purpose now claimed, it passed the legal estate, and being for a fraudulent and unlawful purpose, a court of equity will leave him where it finds him. It passed a legal title, and that legal title has in part, at least, been conveyed to these defendants, and it does not appear that they had notice of the purpose now alleged by Kinney. I have myself, however, no doubt from the evidence, that the deed was intended by Kinney to vest a good title in Long. There is no ground, therefore, for rejecting the Long deed in order to work out a mistake for the benefit of Kinney.

Again, on this ground of mistake, I do not see anything in the evidence which indicates that Kinney ever, till recently, claimed the whole of that sixty feet as against his co-defendants. His testimony is the only testimony, except one passage in Nougues' evidence, that indicates it anywhere, and Kinney's testimony is denied by Jacobs and Weill, and the other undisputed facts and circumstances confirm and corroborate the latter. Jacobs and Weill say he did want them to buy half of the extra ten feet, which he claimed to have located, but which they refused to do, on the ground that there were no ten feet there. Weill says Kinney insisted on his disclaiming any interest in the ten feet, and he did so, on the theory, however, of which Kinney was aware, that there were no extra ten feet to disclaim, and that that was about the time of the suit against Central No. 2. It is very clear that up to that time Kinney recognized Jacobs and Weill as co-owners in that mine to the extent of twenty-five feet, and collected numerous assessments from them on the twenty-five feet, for expenses of working and developing the Kinney mine, giving receipts therefor signed "Geo. W. Kinney, secretary." In this transaction with

Heydenfeldt, Kinney evidently goes on that same theory. He did not, then, pretend in his letter to Heydenfeldt, that he had more than five feet, besides the twelve and a fraction. He says there should be five feet more somewhere—where he did not know—but he supposed it was in Mills, because he had conveyed to Mills five feet once, as security for a debt. He presumed it had never been reconveyed. It turns out that it had been reconveyed, as the evidence shows, so he was mistaken as to that proposition, and, therefore, there probably his mistake lay. He supposed he still had five feet which was in Mills, but now when he conveyed to Heydenfeldt, he only claimed that there were ten and a half feet in the Kinney and Welton, two feet in the Kinney, and he supposed there must be five feet somewhere, but did not know where it was. That is all he claimed; all he made any pretense to. If he did not, in that transaction with Heydenfeldt, recognize the title of Jacobs and Weill to twenty-five feet, and his defective conveyances as valid, he should have claimed some thirty-five feet, which his counsel now claim for him in this action (although no such amount is alleged in the bill), instead of the ten and one half feet, the two feet, and the five feet which he thought he ought to have, but did not know where to look for, because the conveyances do not indicate where the title is, unless he recognized that twenty-five feet in them. He manifestly dealt with Heydenfeldt on the theory that Jacobs and Weill and their grantees owned twenty-five feet, and the fact is that they did own it. He undoubtedly recognized that fact at that time. Now, then, if he contemplated that state of facts when he made his deed to Heydenfeldt, he can not now go back and say there is a mistake; "they did not own it; I owned it all;" when the fact is he did not own it at all. That can not be made the basis of a mistake for the purpose of correcting this conveyance. He himself evidently treated those parties as being owners of the twenty-five feet, otherwise his claim was not such as it ought to have been, and doubtless would have been. Mr. Kinney is an intelligent man. A man who understands what he is about. That is manifest from his testimony. He was in the habit of drawing his own deeds, and with technical accuracy. He knew what conveyances he had made. We are not to suppose he was not aware of all the conveyances

he had made. He does not pretend that he had forgotten any of his conveyances. He does not pretend that he did not know he had made all these various conveyances introduced in evidence here. He made no mistake, then, as to what conveyances he had executed. If he made any mistake, it evidently was as to the effect of that record, which he at that time claimed to be a judgment; and if he made a mistake in that particular, it is a mistake of law, and not a mistake of fact. He could have made no mistake of fact with reference to the amount he had conveyed, or with reference to Jacobs and Weill's owning twenty-five feet of the lode. At the time of the conveyance to Heydenfeldt, also, it is equally manifest, from similar considerations, that he had not conceived the idea of repudiating the Kinney, Mills and Long deeds; and that he recognized the validity of those conveyances, and made his calculation of the amount owned by him on that basis. There was no mistake here, then. This being so, there is nothing left for him upon which to base an equity to sustain a bill for rectifying a mistake.

There is another question which has been very earnestly contested here, and that is as to whether there were any extra feet which Kinney could locate. One side claimed that there were twenty feet and one tenth extra, and the other side claimed that there were no extra feet. The solution of this question depends on the base line of the lode to be adopted for the measurement. In order to get the ten or twenty extra feet, the base line adopted by Kinney runs higher up the mountain and further toward the west, so far that by making the hypotenuse of a right angle triangle the base upon which to measure, a greater distance is obtained than by adopting the base of the triangle for the line of measurement, as claimed by the defendants. By taking the Kinney base and the survey made by Mason, for the purpose of his suit with Central No. 2, there are seventy and one tenth feet. Take the Freeman base, the base claimed to be the true base in the direction of the lode, as claimed by the defendants, and there are left but fifty feet. That is the way the additional twenty feet are claimed to have been found. There is a good deal of testimony on the subject as to which is the proper base. It is insisted on the part of the complainants, however, that the

proposition that there are seventy feet and a fraction, is admitted, and is therefore not open to question. They manifestly misconstrue the pleadings. They first claim:

"1. The undivided ten feet and one twentieth of one foot of ground on the Comstock ledge, so-called, and in that portion thereof described as the northerly twenty feet and one tenth of a foot of a certain mining location made on the twenty-first day of September, 1859, by plaintiff in his own name and for his own use, in Virginia mining district, whereby he located sixty feet in extent of said ledge, commencing five hundred and fifty feet southerly from the southerly line of Comstock's claims, now known as the Ophir Silver Mining Company's ground—said premises being now known as the Kinney and Welton ground.

"2. An undivided interest of twenty-two sixtieths in all that portion of said Comstock lode, thirty-nine and nine tenths of a foot in extent, lying directly south of the parcel of ground last above described.

"3. The undivided five feet and one twentieth of a foot in the portion of said Comstock lode directly south of the last mentioned portion of said lode. Said second and third parcels being known as the Kinney ground."

Now, these second and third propositions are denied in the answer. The only allegation upon which complainants base this claim is the following, and that is not an allegation, that there were seventy and a fraction feet there to be located. It is only an allegation of what the deed to Heydenfeldt contains—what it purports to contain. That is not an issuable allegation as to the quantity of ground to be found there. The allegation reads thus: "Whereby he conveyed away to the said defendant, Heydenfeldt, certain premises *described in such conveyances as follows.*" Then he goes on to describe it, copying the description contained in the deed: "All the following described locations, mining rights or claims, located on the Comstock lode, Virginia mining district, Storey county, State of Nevada, to wit: The undivided one half part of the mine known as the Kinney and Welton; said Kinney and Welton mine consists of twenty and one tenth feet on the ledge or lode, and adjoins the Central No. 2 mine on the south; also, all the interest of said party of the first part in the mine

known as the Kinney (*amount unknown*); said Kinney mine adjoins the White and Murphy mine on the north, and consists of fifty feet on the ledge or lode, and also an undivided interest of one hundred feet, in the mine known as Defiance"—and so forth. That is simply an allegation of what that deed contains; it is not an allegation that that amount of land in fact was there. There is no direct issuable allegation as to what amount of ground was there. The defendants could not deny that allegation because the deed did not contain that description; they only made the allegation to show what the deed purported to convey. Defendants admit that the deed did contain the description alleged, and could not truthfully do otherwise. It is true we may infer that there were seventy feet there. But inferential or argumentative pleading is not admissible. A fact can only be put in issue by a direct allegation in such a way that the party can take issue directly on it. There is no such allegation in this complaint. It is merely an allegation of what was contained in the Kinney deed—what it did contain on its face without saying that that amount of mining ground was there to be conveyed. There is no allegation on that point on which defendants could directly take issue; hence the existence of the amount of seventy and a fraction feet is not admitted by the pleadings. The testimony on this point I do not propose to fully discuss, because I do not think it necessary to the decision of this case; but I will refer to some parts of it. Mr. James has been the surveyor of those claims ever since 1860 or 1861. He is the man of all others most thoroughly acquainted with that lead. Marlette was the county surveyor and surveyor-general, and did surveying there, and he confirmed him. The other parties have not surveyed it with a view of ascertaining the range, strike or direction of that lead. There is the testimony as to the general direction of the lead of Mr. Ashburner and the testimony of some others, but they have never surveyed it with the intent of ascertaining the strike of the lead, whereas James has been surveying there constantly from the beginning down to the present time, and knows all about it, if anybody does. Freeman established this base line as now claimed by counsel for the defendants as early as May, 1860. Complainants' counsel had a map made from Clarence King's report, and claimed a right

to refer to it, but it was not introduced in evidence. He claimed that the court should notice it as a public document, and I will refer to it also. James says that the Freeman base is parallel to the lode on that portion of the lead—as nearly parallel as a line can be drawn. Although it is not in evidence, the plat which purports to be a copy of the map of Clarence King, was used in argument by complainants' counsel, who claimed the right to refer to it, and claimed that it shows the claimants' base to be parallel to the lode or lead. That depends on what is called the course of the lode as laid down here—whether we take several miles in extent or take it in reasonable sections.

This part in yellow purports to be a section of the lode, as counsel say, fifteen hundred feet below the surface; therefore, it is below and to the eastward of the stake of the Ophir, and the base line drawn from it. If this green line representing the Freeman base were moved down three fourths of an inch—if it be brought down to correspond with the level of the section—the green line from there to there [pointing], for the distance of nearly four thousand feet, or more than three-quarters of a mile, would run directly through the center of the ledge, as claimed here by the defendants. If this represents the correct position of the ledge, fifteen hundred feet below the surface, and the green line on that part should be moved eastward, it would run directly through the center of the ledge as laid down on the plat, for a space of about four thousand feet, which includes the Savage claim, and all north of it, up through and beyond the Ophir. The line as drawn on the plat simply cuts the bulge at the top. If this plat is correct, it is plain to be seen by the mere inspection, that the green line represents the course or strike of the ledge throughout this section of four thousand feet through the whole length of Virginia City, much more nearly than the red one. But this plat is not a copy of Clarence King's map, except as to the section of the ledge laid down on it. The lines laid down showing the end lines of all these claims, are indicated on this map as at right angles to the red line; that is to say, the complainants' line. Whereas, in fact, on Clarence King's map these end lines of the claims are laid down so as to correspond very nearly with the testi-

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mony of James, and with the lines as laid down on the map of Virginia City, introduced in evidence, and on all the maps with which I am acquainted. I do not know why the lines were changed in making this copy, or what I understand purports to be a copy, of King's map. There is one line indicating what would be at right angles to the green line. The lines of the claims laid down hereon are drawn at right angles to the red line instead of the green line, as though they were copies from Clarence King's map. I don't know whether that was intended to be understood as showing the claim lines as on King's map or not. If it be so, it is not in accordance with the fact, because I took occasion to examine King's map myself, and the end lines of all those claims, as laid down on it, are located very nearly the same as they are represented on the Virginia City map introduced in evidence, and to which the testimony of James and other witnesses was directed, and at nearly right angles with the green line, or Freeman's base line. Not only that, but on every map I have ever seen, the end lines of those claims are laid down as running in the same direction at right angles with the Freeman base line. All public maps brought to my notice show these facts. I have at least four in my chambers which have been the subject of judicial investigation, drawn from official surveys, and every one lays the end lines down in the same position, or substantially the same, as those on the map introduced in evidence and as laid down substantially on Clarence King's map, and as have been adopted in government patents issued to those companies which have had their claims patented.

On a map of Virginia City, in evidence, the end lines of all those claims, from the Savage north, except these lines put on to show the claim of Kinney as claimed by him, are drawn at right angles to the defendant's base; that is to say, the Freeman base. The testimony shows that the claims have been held and worked from the earliest times down to the present, on that theory—have been possessed, owned and worked upon lines running in that direction. Kinney is the only one who claims a different line—and his associates did not admit his line, but claimed the other. The Mason survey, made for Kinney for the purposes of his suit, is the only survey shown as having been made in accordance with that one adopted by

him. I do not understand it to be disputed that the White and Murphy line is established and fixed as drawn at right angles to the Freeman base. If, then, Kinney's claim did not arise until the twenty-first of September, 1859, as he now claims, and the Booth claim until January, 1863, both are subsequent and subordinate to the other claims that were located on the Comstock lode, and must yield to them; those that were located, established, held and worked on the theory that the Freeman is the proper base line. Upon this view, then, there are only fifty feet, and not seventy and a fraction, as Kinney claims. I confess it looks to me from the testimony as if there were only fifty feet there. It is true, as argued, that the defendants have purchased seventy and a fraction feet, and issued stock on that basis. There is nothing necessarily strange in this in respect to mining claims. Parties often find it to their interest to buy up all outstanding claims, because this course is found cheaper than to litigate, and when they thus buy to quiet their titles and avoid litigation, it is not remarkable that the stock should be issued on the basis upon which they purchased. This course does not necessarily admit the validity of all the claims purchased. A party may buy his peace, without any prejudicial admission.

I do not propose to spend any further time in discussing this question now, nor to definitely decide this point at the present time. I do not know what may arise hereafter. I leave that question open, so far as I am concerned, for further consideration, if occasion should arise. I do not find it necessary for the purposes of this decision to pass definitely on that point. As that is the most favorable view for the complainants, I assume for the purposes of this decision, that there were seventy and one tenth feet. But the testimony indicates that Kinney's claim on this point is wrong. If, however, it is right, and the other claims are maintained in their present positions, then his correction would be fruitless, because no part of the Kinney ground located at right angles with the Mason base—the base as claimed by complainants—having ore in it, is within the California ground, as now or ever possessed or claimed by the California company, the north line of the White and Murphy being the dividing line between the present Consolidated Virginia and California

companies. It is only within the California ground, on the theory that the end lines are drawn at right angles to the Freeman base, and if so drawn, there can be but fifty feet in the whole claim. The ore sought to be secured on complainants' theory is not even in the White and Murphy ground, for their lines cross over the White and Murphy ground in the direction that the complainants claim their lines to run before getting down to the ore on the twelve hundred and thirteen hundred-foot levels, as the testimony shows; and the mine must be now worked on the Sides ground, beyond the White and Murphy to the south. And the lines, as claimed by Kinney, if continued below the present workings, will soon cross the Best and Belcher into the Gould and Curry. At all events, no part of the bonanza which has been discovered, and which is sought to be recovered in this case, is within the White and Murphy ground, provided their lines are to remain as heretofore and now established, and much less within the possession or occupation of the California Company, whose claim is to the north of the White and Murphy. As I said before, I merely throw out these observations without passing definitely on the question.

Again, on the pleadings and exhibits and testimony, which are uncontradicted by Kinney, I do not think that there is any mistake that the court can be called on to correct. The parties on both sides were evidently dealing in admitted ignorance of the exact amount then unsold, unless they assumed that the deeds conveyed the correct amount of ground. Kinney both telegraphed and wrote to Heydenfeldt to sell *all* his ground. He made the deed himself by which he conveyed it to Heydenfeldt for the purpose of enabling him to sell all. He states what he considers to be the ground in the Kinney and Welton part. When he came to the Kinney ground, he states that the amount is unknown. He conveys by his deed to Heydenfeldt the undivided half part of the mine known as the Kinney and Welton. "The said Kinney and Welton consists of twenty and one tenth (20 1-10th feet) on the ledge or lode, and adjoins the Central No. 2 mine on the south. Also, all the interest of said party of the first part, in the mine known as the Kinney (*amount unknown*); said Kinney mine adjoins the White and Murphy on the north, and consists of

fifty feet on the ledge or lode." He says the amount is *unknown* in the Kinney ground. He directs Heydenfeldt by telegram and by letter to *sell all*. Heydenfeldt answers by telegram that he has sold all, and tells him the amount for which he sold, and directs him to draw on him for the amount. He did draw on him from time to time, by drawing check after check, till all was received. In his letter, however, he says there ought to be five feet more, and he thinks it must have been five feet in Mills, conveyed as security, which had never been reconveyed. But it turned out to have been reconveyed. He was uncertain as to the amount, and if he had any more, he did not know how much or where it was; and with knowledge of this fact, he made that conveyance, which he drew himself. He referred to the abstract of Heydenfeldt, which he had seen, and knew that it showed some title in him to two feet in the Kinney ground. He does not know where the rest is, and the amount is unknown. Heydenfeldt intended to sell all that Kinney had, and Flood intended to purchase and desired to purchase all the outstanding interests. Heydenfeldt did sell all, and he made his deed in the exact words of Kinney's deed to him, including "amount unknown," specified as in Kinney's deed. He thought there were two feet. He sold it as two feet, and got payment for it as two feet; but his intention was to sell all, and Flood intended to buy all; and the mistake, if any, was as to what constituted "all." Kinney was in doubt himself, because he could not find more than two feet. Heydenfeldt was not satisfied that there was sufficient to answer the call for two feet—and Flood acted upon Heydenfeldt's view as to the amount—but Flood was willing to pay for two feet. They were both, therefore, as well as Kinney, conscious of the fact that the amount was uncertain, and dealt in view of that fact; and if now, after the elaborate efforts to make the exact facts appear, anybody should read the voluminous testimony with a view to find out whether there was in fact any more than two feet, he would find it very difficult, at least, to say there was, and still more difficult to determine exactly how and where it is to be located. Where parties deal with each other with the knowledge and in view of the fact that something is uncertain as to the amount or condition of the subject-matter of their dealings, and the con-

tract relating thereto is in the form intended, there is, under the authorities, no ground for correcting a mistake, if it should finally turn out that one had intervened. Undoubtedly Heydenfeldt intended to convey all; Flood intended to buy all, Heydenfeldt had authority to convey all, and it was intended to convey all. The conveyances were in the form intended; and Kinney, from time to time, extending through a period of a month, after information that all had been conveyed, and of the price for which all had been sold, drew the money. It turns out, if there was a mistake, that they were mistaken as to what "all" was. The deeds, both of them, had the forms which were intended. Kinney's deed was prepared by himself, and intended to cover all that there was in the mine. They were dealing with a matter of uncertainty, and at the time Kinney was satisfied. Long after that, when a rich mine had been developed by, and at the expense of, the defendants, Kinney begins to look up what he calls "his missing feet." He does not, even then, go to Heydenfeldt. He did write a letter to Heydenfeldt immediately after the sale, but before he drew his money, in regard to the five feet of Mills ground, to which Heydenfeldt did not reply. He says he wrote other letters, but Heydenfeldt says he did not receive any, and I am satisfied he did not, and I believe none were written. He never did complain to Heydenfeldt, and he waited two years before he took any serious action, and until after the rich bonanza had been developed, and the expenditure of the defendants in this case, in developing the mine, had been incurred.

A principle, which is the result of the authorities all going to sustain it, is well stated by Story, and is applicable to this subject: "Relief will be granted in cases of written instruments, only where there is a plain mistake clearly made out by satisfactory proofs. It is true that this in one sense leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice, for in many cases judges will differ as to the result and weight of evidence; and consequently they may make different decisions upon the same evidence. But the qualification is most material, since it can not fail to operate as a weighty caution upon the minds of all judges, and it for-

bids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt, or to opposing presumptions. The proof must be such as to strike all minds alike, and must unquestionably be free from reasonable doubt." (1 Story Eq. Jur. Sec. 157.)

Now that principle, established by the authorities, is well and very strongly expressed, and as counsel for the defendants very well remarked, if that is the rule, it cuts up this case by the roots. It is impossible to say that the complainants' right is clear; that there is a clear mistake in the conveyance made; that it is established by the testimony adduced in this case beyond all reasonable doubt. At least so it seems to me. There is a late case, 3 Otto, 61, 62, which has some application to this subject. It is the case of *Grymes v. Sanders*. This, I take it, was a bill to rescind, rather than a bill to reform. I judge, from certain remarks of the court, that it was to rescind. At all events the ground for relief was mistake. It was in the purchase of a mining claim in the State of Virginia. The principles are applicable to both kinds of relief, mistake in both being the ground. "Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person." (61.) Again it is said: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillations are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this can not be done, it will give such relief only when the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he

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was aware of the claim of the appellees and can not conveniently restore it. The imperfect and abortive exploration made by Bowman has impaired the credit of the property. Times have since changed. - There is a less demand for such property and it has fallen largely in market value."

There was certainly negligence in this case, on the part of Kinney, in not ascertaining the exact condition of the title. He knew what he once had. He knew what conveyances he had made. It is not pretended that he had forgotten any one of them. It was a mere matter of figures and calculation, unless it required some special genius to discover and locate the conveyances made so as to work out the mistake. If he made a mistake, it was probably a mistake of law as to the effect of the judgment under which he claims a segregation. Again the delay. He did not pursue the matter to see whether he had made a mistake or not. He could have as well ascertained at once, by careful investigation, and before accepting the purchase money, whether he had in fact any more ground there, as to have waited two years before doing it. He accepted the purchase money after knowledge that all had been sold, and after his attention had been turned to the mistake if any there was, and then waited two years, until his grantees, at their own expense, had developed a rich mine.

It is true that they have been richly rewarded for their energy and expenditure. But they might not have been; they might not have found a rich mine; they might have expended large amounts of money without finding a bonanza. It was their risk and they took it. Kinney did not even pay, or help to pay, for the development which enabled him to sell at all. On the contrary, he declined to do it. The company offered a long time before to take his mining interest and issue him stock for it. He refused, expressly on the ground that in that case he would be obliged to pay the assessment. And Flood had two hundred dollars per foot back assessments to pay before he could get his stock for the interest purchased of Kinney, and conveyed to the other defendants. Kinney had declined to expend any further moneys, and then, after this sale and conveyance, had allowed defendants to go on and develop the mine, on the supposition that they owned it, until they discovered a bonanza. He allowed them to take the risk

on themselves and develop a mine, and then he comes in two years afterward and claims that in the conveyance there was a mistake. When urged on by the prospect of large gains, he set to work to find a mistake, and upon the ingenious theory laid down here, he claims to have found one. So, again, with reference to the *statu quo*, the remarks will apply. The parties can not be put in *statu quo*. They can not be put in the condition in which they were when this interest was bought and conveyed. Defendants, in good faith, relying on their title, have expended large sums of money and thereby developed a rich mine. They have very largely, enormously, I may say, enhanced the value of the property by their own labor and energy and the expenditure of their own money, which Kinney had declined to do, or to aid in doing. It is precisely the same principle applicable, to a greater or less extent, to bills to correct mistakes, as that applicable to a bill to rescind. Both rest upon the same equitable principles—upon the same equities.

In view of all these authorities and these rules of law, I do not think it possible for any one examining this record to say that there is clearly such a mistake here as to entitle the party to the relief sought at the hands of a court of equity.

With reference to Smith and Bryant, they have purchased in since the commencement of this action. Smith is complainants' principal counsel of record in the case; they have got a conveyance from Kinney since the commencement of this action, from the complainant in this suit, conveying to them all his rights in the mine. He stepped out, and they took the action on themselves—on their own shoulders. Now they claim on the ground that they are *bona fide* purchasers for value without notice of the prior conveyances; that they are not affected by the Mills deed, the Kinney deed, and the Long deed. They say they did not know anything about the Long deed, and they did not know anything about the Mills and Kinney deeds. They say the latter deeds were void, and conveyed nothing as to the grantees; that they took the title without notice of their prior equities, and, therefore, they have equities behind Kinney such as he had not. There are several difficulties in maintaining that proposition. The first difficulty to which I will call attention is the fact that when

they took their conveyance Kinney had already conveyed to Heydenfeldt and Heydenfeldt to the other defendants, by deeds in due form, duly acknowledged and recorded, and of these deeds they had notice. The legal title was in the defendants. Now if there was any equity which Kinney could have conveyed to anybody as against his prior vendees by reason of want of notice of the invalidity or irregularity of these deeds, he conveyed that equity, as well as the legal title, so far as he was able to do so, to defendants; so that both the equities, and the legal title in fact, passed to them by the prior conveyances, and there was nothing left in Kinney to convey to Smith and Bryant except the equity which Kinney himself had against the defendants themselves, and not as against his prior grantees, to reform this instrument. If Kinney had any equity as against the defendants on which he could obtain a reformation of this deed, it may be conceded that he conveyed that equity to Smith and Bryant; but he could convey nothing more, for there was nothing more in him to convey at the date of his deed to them. Defendants, through the deed to Heydenfeldt, not only acquired all that was possible for Kinney to convey, subject only to such equity as Kinney might have as against the defendants on the ground of mistake, but they had before acquired from Kinney's prior grantees the equities as against Kinney and Smith and Bryant, which those grantees obtained by virtue of the several purchases which the defective deeds were intended to consummate, and the defendants were in possession, both under their and Kinney's deeds at the date of Kinney's conveyance to Smith and Bryant. The defendants, therefore, not only had the legal title, but all the equities that Kinney himself and his prior grantees could convey, but they had the possession under their conveyances at the time of the conveyance to Smith and Bryant. These intervening equities of defendants as against all parties, and the legal title in them, must be abrogated and disposed of by a reformation of the deed in question before Smith and Bryant's equities, which lie behind them, can attach as against Kinney's prior grantees; and that reformation must depend upon such equities alone as Kinney himself had and could enforce as against defendants.

So far then as the equity of Kinney, as against these defend-

ants is concerned, conceding that he could convey it, he could only convey what he had to Smith and Bryant, and that is simply his equity to reform this deed. On this ground I think Smith and Bryant stand in no better position than their grantor, Kinney, and that they would have been in no better position than he, had they received their conveyance before the commencement of the suit, and they had brought the action themselves.

Another ground is that Smith and Bryant purchased pending the suit. I can see no reason why Smith and Bryant should not be bound by the decree in the suit, or why the decree should not be the same as it would have been if they had not purchased in and become parties by supplemental bill. If a different decree must be pronounced, there must be a change in the cause of action. By bringing them in, they must introduce a new cause of action—a cause of action different from that which was originally alleged in the case, or the decree must be the same. The supplemental bill only alleges a transfer of the complainant's interest *pendente lite*, and that Smith and Bryant are entitled to the *same* relief asked by Kinney in the original bill. It alleges no new or other equities—no new equities in favor of the original complainants' grantees—and there are no allegations upon which a decree for other rights than appear in the original bill can be based. Smith and Bryant took the suit subject to any claim which the defendants could establish as against the complainant in the original bill. They had notice by the action of all the rights of the defendants, and they stand in no better condition than the original complainant.

Again, the defendants at the time of the conveyance to Smith and Bryant were in possession. The defendants were in actual, notorious, exclusive possession under their conveyances, both from Kinney and from his prior grantees. They had the legal title and the actual possession; and the possession itself was evidence of notice of defendants' rights which Smith and Bryant were bound to recognize. Such has been the rule with reference to land at all times, and it is so with reference to mining claims. Defendants' equities as against Kinney's prior grantees are, at least, equal to Smith and Bryant's against the same grantees, for defendants had con-

veyances from said prior grantees, and again from Kinney himself, conveying all that remained in him prior to the conveyance to Smith and Bryant, and were in possession, and their equities being at least equal to those of Smith and Bryant, the condition of the party in possession is best.

It was said in answer to this that other parties were in possession as well as defendants, because the possession of the defendants was the possession of their co-tenants. But Smith and Bryant did not get their title from those other parties. They derive their title from Kinney, not from those other parties, if any there be, and the defendants were the first to get the title from Kinney, and were themselves in possession adversely to him; while Kinney was not in possession at all at the time he made the conveyance to them. The defendants' possession was their own alone.

With reference to the Long deed, the Long deed was a valid deed as to Kinney. As to that, there is only the question of notice. That title had been conveyed to defendants, and they were in possession, claiming also under that title, and the possession under the title was notice to Smith and Bryant. Besides, the deed to Heydenfeldt perfected the title, and being on record was notice to Smith and Bryant. It may be true, as stated, that Heydenfeldt did not know at the time of Kinney's conveyance to him, or at the time of the commencement of this suit, that the Long deed was in existence; but he derived title from parties who claimed under Long and, under that deed—whose deeds were on record and who were generally recognized as long ago as 1862-3, as in possession in connection with Kinney, on that ground, and they went in possession under that deed. Some of the defendants' trustees—of the California Company's trustees—however, were aware of it. Williams was aware of it. He states that he knew all about the existence of this Long deed, as he must have known from his relation to the suit in which it was recognized. At all events, the grantees of Long were in possession, and it was not necessary that defendants should be aware that there was in fact a deed from Kinney to Long. I have repeatedly held that in the early days, at Virginia, the transfer of the actual possession of a mining claim and submission to it by possession of the transferee acquiesced in—possession in pursuance of such

a transfer acquiesced in—was a good transfer of a mining claim, independent of any deed. That was so held in the early days of California down to 1860. The Supreme Court of California subsequently held, though I dissented, that the statute of 1860 abrogated the rule. I thought that the act of 1860 was only intended to place a conveyance without seal upon the same footing as a conveyance with a seal. I am not aware that the latter rule has been adopted by the Supreme Court of Nevada. I have always held, and I shall continue to so hold till overruled by a higher court whose decision I am bound to follow, that the actual transfer of the possession of a mining claim in those early days with a view of transferring the title, followed by a possession under it acquiesced in, made it a valid transfer of a mining claim. I have so held repeatedly, and had occasion at the last term of the court in Nevada to so hold in a case against the Consolidated Virginia Company, where each party had found it essential to his case to maintain the proposition that a transfer of that kind was valid. Each one, to maintain his own case, had to insist on that proposition, and I sustained it.

In the case of the *420 Mining Co. v. Bullion Co.*, 3 Saw. 658, I held that a parol partition followed by possession acquiesced in, in accordance with the parol partition, is a valid contract of partition of a mining claim; and if there is any partition at all in this case, there must have been either a prior parol partition recognized in the judgment appended as a supplemental judgment to the Central No. 2 case, or else that record must be regarded as a valid contract of partition; and even that did not bind Jacobs and Weill, unless they subsequently acquiesced in it. I have held in other cases to the same effect. Any other ruling upon parol transfers, followed by possession, would disturb many old and highly valuable titles on the Comstock lode. There was no necessity then for a deed at that time, if there was an actual transfer of the possession, and an occupation in pursuance thereof acquiesced in.

The defendants claim from the grantees of Long; and they must have known that Long claimed title under some one else, and there is no pretense that they came in under any one else but Kinney. The testimony shows that Long and his grantees must have been in possession, because they were sued as in

possession, and they defended jointly with their grantor Kinney. Kinney answered for them. It was enough that defendants knew that Long was in possession, claiming title, without knowing whether he got it by deed or by transfer of the actual possession. At all events, these defendants went into possession under title derived in part from Long, and their possession at the time of the conveyance to Smith and Bryant is notice of their claim to these complainants as to the Long title. Besides, the conveyance from Kinney, if there is no mistake which Kinney himself is entitled to have corrected, cured any defect in Long's conveyance. As to no part of these premises do Smith and Bryant stand in any better position than the original complainant in this case.

To conclude, then, after a thorough examination of this case, having gone through the entire testimony from beginning to end, and having read all the material parts, two or more times over, not relying on the abstract of counsel, I think I understand it, and the more thoroughly I examine and comprehend it, the better satisfied I am that this case is utterly barren of any equities to sustain the claim set forth in the bill.

This case has been argued with great zeal and with very great ability, and certainly great ingenuity has been exercised in dividing up the seventy feet claimed to have been located by Kinney and Booth, in such a way as to cut out from these defendants the ground which they have purchased from Kinney and his grantees. They purchased the full amount of Kinney's part of the seventy feet and a fraction, paid for it, and got conveyances for it from Kinney and his grantees whether they have got that amount of ground or not. It requires a good deal of ingenuity to divide this up; to transfer the claims of Booth and Kinney, the extra ten feet claimed by each, from the south to the north, and so arrange it as to apportion Kinney's conveyances in such a way as to have made Kinney to have sold and conveyed some portions several times over, and not to have sold other portions at all.

This case, I presume, will go to the Supreme Court. The amount involved—complainants aver that \$20,000,000 have been extracted from the premises, of which they pray an account—is such, that if the parties have any confidence in their claim, they will be very likely to carry it further. I have en-

deavored to get at the merits of this case, to the bottom, to the "bed-rock"—to use a mining phrase appropriate to the occasion. I have spent a great deal of time on it, and I think I comprehend it; if not, it is fortunate for the complainant that it is an equity case, and so will go up on appeal, and not upon a writ of error. The Supreme Court tries the case *de novo*, without any regard to my decision or rulings, and it will give such judgment as the law and the evidence appear to that court to require. If there are any equities in the case, which my examination has failed to disclose, they will certainly not escape the notice of that distinguished tribunal.

Let a decree be entered dismissing the bill with costs.

1. Rule under which mistake in written lease will not be corrected: *Brainerd v. Arnold*, 8 M. R. 478.

2. False representations, (not fraudulent) relieved against in equity on the ground of mistake: *Roosevelt v. Fulton*, 6 M. R. 377.

3. Mistake must be proved beyond reasonable doubt: *Stockbridge Co. v. Hudson Co.*, 102 Mass. 45; S. C., 107 Mass. 290; *Post* RESERVATION. Issues to jury on bill charging mistake. *Id.*

4. One clause in a contract may be affected by mistake, without avoiding others: *Verzan v. McGregor*, 2 M. R. 565.

5. Mutual mistake as to length of tunnel. *Id.*

6. Evidence to support bill to correct mistake should be positive. Parol evidence admissible: *Ewing v. Sandoral M. Co.*, 110 Ill. 290.

7. The mistake of a recorder copying the location certificate of the "Tanner Boy" as the "Farmer Boy" can not be allowed to prejudice the owners: *Weese v. Barker*, 7 Colo. 178. To same effect: *Myers v. Spooner*, 9 M. R. 520.

8. Reformation of mistake in description of lands sold or reserved. *Wilcox v. Lucas*, 3 M. R. 380; *Hartford Co. v. Miller*, 3 M. R. 353.

9. Mistake vacates settlement: *Perry v. Attwood*, 8 M. R. 441.

10. Mistake in location certificate calling for the wrong legal subdivision will not invalidate it if the claim be otherwise sufficiently described: *Duryea v. Boucher*, 7 Pac. 421.

BENTLEY V. BATES ET AL.

(4 Younge & Collyer, 182. Court of Exchequer, 1840.)

- ¹ **Account against mortgagor and his co-tenants.** Mortgagee of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the other tenants in common.
- ² **Dissolution need not be prayed for.** On a bill for an account of the dealings and transactions of a mining partnership it is not necessary to pray for a dissolution of the concern.

The bill stated that in August, 1821, Sir Henry Ibbotson granted a lease of certain collieries to four persons of the name of Lascelles, for the term of thirty-one years, for the purpose of working the same in equal shares for their mutual benefit. That under and by virtue of this demise the lessees entered and commenced working the collieries in the shares before mentioned and for their mutual benefit. That they afterward assigned their respective shares to different persons, and that one of them, Joseph Lascelles, assigned his share to Isaac and Thomas Hunt. That the assignment by the Lascelles was carried into execution by means of a deed of arrangement which contained rules and regulations as to the manner in which the collieries were to be worked by the assignees. That after the execution of this deed Thomas Hunt died and Isaac purchased his share, which was duly assigned to him, and that by this means Isaac became entitled to two eighth parts of the concern. That in August, 1823, Isaac Hunt applied to Timothy Bentley to lend him 2,000 pounds, on the security of his share and interest in the demised collieries; that the money was lent and that Hunt executed to Bentley an indenture dated the seventeenth of August, 1823, whereby, after reciting the indenture of arrangement and reciting another mortgage for 500 pounds, which Bentley had agreed to pay off, Hunt, in consideration of 2,000 pounds so lent to him, and of the payment of the 500 pound mortgage, assigned to Bentley, his executors, etc., all of his one fourth share of and in the collieries demised by Sir Henry Ibbotson by the indenture of August, 1821, to hold the same to Bentley, his

¹ *Chapman v. Porter*, 1 M. R. 102.

² See *Russell v. Ford*, 1 M. R. 75.

executors, etc., subject to a proviso for redemption on payment by Isaac Hunt, his heirs, etc., of the sum of 2,500 pounds on the 7th of February then next. That at the time of the execution of that indenture, the other shares were possessed by a variety of persons, and that various devolutions of those shares took place, under which the defendant Bates, became the principal owner, and that he likewise became the principal manager. That in 1826 the only persons concerned in the trade were Isaac Hunt and the defendant Bates, the share of Isaac Hunt being subject to the before mentioned mortgage to Bentley. That in December, 1826, Hunt was arrested, and by arrangement with Bates was excluded from the management of the concern without the sanction or concurrence of Bentley, and that since that period Bates had been the principal manager. That Hunt died in 1830, having made the defendants, Anderson and Colls, his executors, who proved the will and became entitled to Hunt's share, subject to Bentley's mortgage. That Bentley had died and appointed the plaintiffs his executors. That under the management of the defendant, Bates, the collieries had become unproductive, as far as the plaintiffs were concerned, and that the whole of the principal sum due on the mortgage, with a considerable arrear of interest, remained unpaid. That large quantities of coal had been got from the property, and great profits made, and that the plaintiff had applied to Bates for an account, but that none had been rendered, and no money paid. That though some accounts had been pretended to be rendered they were imperfect and evasive. That the defendants, the executors of Hunt, were desirous of having the accounts settled and adjusted, but had declined to join in the suit. That Bates had in his possession all books, etc., relating to the partnership concern.

The bill prayed for an account of all the dealings and transactions relating to the collieries since the defendant Bates had been manager, and also for an account of his receipts and payments, and that the clear balance might be ascertained and paid; for the removal of Bates and for the appointment of some proper person as manager, and for an injunction to restrain him from interfering in the concern.

To this bill the defendant Bates demurred generally for want of equity.

Mr. ELMSLEY, for the demurrer.

SIMPKINSON and KENYON PARKER, for the bill.

THE LORD CHIEF BARON.

It ought to be a clear case which should induce a judge in equity to allow a demurrer, because, if allowed, it puts an end to the bill. If the case is one of doubt, all the advantage which may be had by the party demurring may be obtained by him at the hearing of the cause.

But I own I entertain a strong opinion that there is no ground for this demurrer. The case of the defendant has been very ingeniously argued by Mr. Elmsley, but in the course of his argument he assumes, for the purpose of enforcing his objections to the bill, that the parties are tenants in common of a mine, while he answers those very objections by saying that they are mercantile partners. Now the ownership of the colliery places them, for some purposes, in the situation of mercantile partners, but not for all purposes. They are partners for purposes of justice and convenience, but not for purposes of injustice and inconvenience. It is hard to say that the joint ownership of a colliery must be put an end to by dissolution before an account can be taken. I do not agree that in a case between joint tenants, or tenants in common of a colliery, one party can *compel* another to sell his share and dissolve the concern previously to taking the account. That was not the meaning of the statute which gave the account between them, or of courts of equity which had the jurisdiction over such accounts previously to the statute. The rule as to the necessity of praying for a dissolution in order to take the account was meant to apply only to mercantile partnerships.

Now, as to partnership itself, if you look to the constitution of a mercantile partnership, what is the meaning of a partner mortgaging his share? Nothing more than that he covenants to pay the amount borrowed. It can not mean that another person is by means of such a transaction to be forced into the partnership. The mortgage is nothing more than a personal covenant. It conveys no interest in the part-

nership effects. Put the case of the other partner having had notice of the transaction, and afterward rendering an account to the creditor. He does not thereby make himself a partner with the creditor, but only shows that he means to be accountable and to render accounts; and, supposing the accounts are fallacious, if there is no remedy in equity, the party has none at all, for there is none at law; and no action against the supposed mortgagor would be available.

But that is not the case here. I only put it to show the effect of such a transaction between mercantile partners. Here the partnership is in land. Now, nothing is better known at law than that such a partnership has not all the incidents of a common mercantile partnership. It has been held by all the courts of law that the partners in such a concern can not sign promissory notes, or give bills of exchange to bind each other. I held this in a late case at Guildhall on a bill accepted in the name of the Sneid colliery by a partner in the concern. I decided that the other partners were not bound by such acceptance, and that ruling was confirmed yesterday in the court of exchequer. That shows that the partners in these concerns do not stand in the same situation as ordinary partners. The nature of their obligations is different; their implied obligations are different, though, in some cases, it is useful to apply the principles of partnership to their proceedings.

This is an interest in a colliery for a thirty-one years term. One lessee has assigned his share to a mortgagee, with the usual proviso for redemption. Mr. Elmsley does not deny that if he were a perfect assignee he might file a bill for an account against his co-lessee. Let us see how far that admission carries the argument. There is some confusion arising out of the words, "equity of redemption." If you examine it strictly, the interest conveyed by mortgage can be taken advantage of by the mortgagee or his assignee to the fullest extent, subject to the power of redemption. A power of redemption is reserved in the conveyance, but the mortgagee has the absolute interest at law. Now it would be absurd to give him the absolute interest without all the powers attached to such an interest. It is true that in certain circumstances he is treated as a trustee for the mortgagor, but in point of law his remedy on the title is the same as if there were no equity of redemp-

tion at all, except against the person who has the equity of redemption. At law he may bring his action and turn out the mortgagor. In equity, if it be necessary for him to file a bill, in which the owner of the fee or termor has an interest, can any person not claiming under the mortgagor make any objection to that bill? When in possession he has the same interest as the mortgagor, except in the one case of the mortgagor calling him into equity. How can this be taken advantage of by a co-tenant who is a mere stranger? It appears to me that a mortgagee like this has the same remedy against his co-tenants as his mortgagor had. I put the case of an original mortgagor against the joint tenant: In this particular case, the executors of the mortgagor are made defendants, because they will not join. That, I think, is immaterial. I can not allow this demurrer, because I think that the party has no other remedy than this bill. Besides, as Mr. Parker put it, the defendant Bates is manager of the concern, and how can the plaintiff have remedy against him except in equity?

Demurrer overruled.

THORNEYCROFT V. CROCKETT.

(16 Simons, 445. High Court of Chancery. 1848.)

¹ **Mortgagee can not open mines—Accounting.** A mortgagee in possession who had *opened* and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses.

The bill was filed by a mortgagee, who had entered into possession of the mortgaged estate to foreclose the mortgage. The decree directed the master to take an account of the principal and interest due to the plaintiff, and of the rents and profits of the estate received by him, or by any person or persons by his order or for his use, or which, without his willful neglect or default, might have been received; and in case the master should find that the plaintiff had been in the occupation of the mortgaged premises, or any part thereof, that he should set a value by way of annual rent thereon,

¹ *Franklin Co. v. McMillan*, 10 M. R. 224; *Hughes v. Williams*, 12 Ves. 493; *Millett v. Davey*, 31 Beav. 470.

and that the plaintiff should be charged with such value, on taking the account of such rents and profits; and that the master should inquire and state whether the plaintiff had expended any and what sums of money in necessary repairs and lasting improvements on the mortgaged premises, and that what the master should find to have been so expended by the plaintiff should be deducted from what should be coming from him on account of the rents and profits and occupation-rent; and in case the master should find that the amount of the rents and profits received by the plaintiff, after such deductions as aforesaid, and the occupation-rent to be charged as aforesaid, exceeded the interest due on the mortgage, it was ordered that he should make annual restitution in taking the said accounts.

The master found that the plaintiff had *opened* and worked mines on the mortgaged estate; and in taking the accounts directed by the decree, he charged the plaintiff with his receipts from working the mines, but did not allow him the expenses which he had incurred in opening and working them; and on that account the plaintiff excepted to the report.

Mr. JAMES PARKER and Mr. FABER, in support of the exceptions, said that the account to be taken against a mortgagee in possession was stringent, but not penal; that the mortgagee was entitled to all just allowances; that the decree in this case directed the master to inquire whether the plaintiff had expended money in making lasting improvements on the estate, and did not contain any special directions which authorized the master to do what the exceptions complained of; that *Hughes v. Williams*, 12 Ves. 493, which had been relied on in the master's office, did not apply, for there the expenditure had been unprofitable, but here it had been profitable; that in *Morgan v. Powell*, 3 Queen's Bench Rep. 278, a court of law held that even a trespasser was entitled to be allowed the expense of removing coal after it had been severed from the soil, and bringing it to the pit's mouth; and that if a trespasser was entitled at law to be allowed something, a mortgagee was entitled in equity to be allowed much more.

Mr. STUART, Mr. BETHELL, Mr. GREENE and Mr. W. W. COOPER, appeared in support of the report; but

The VICE-CHANCELLOR, without hearing them, said: If there had been any intention that any such account as is now asked for should be taken, the decree would have been in a very different form. What the mortgagee has done is this: he has actually sold away a part of the inheritance.

Exceptions overruled.

BLACKWELL V. OVERBY ET AL.

(6 Iredell's Eq., 88. Supreme Court of North Carolina, 1849.)

¹ **Deed proved mortgage, by parol.** A deed absolute on its face may be shown to have been intended only as a security; not by parol evidence merely of the agreement at the time, but by clear proof *dehors* of facts and circumstances which are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended.

Application of the rule to the facts. A made a conveyance to B and C, absolute on its face, of his interest in a gold mine, for \$40, when it was shown to be worth \$400. A at the time was in great distress for money; the alleged price was not paid at the execution of the deed, nor any security given for it; upon a sale by B and C, within a short period, they accounted with A for a part of the proceeds; A remained in possession after the alleged sale, working the mine, as before; A asserted, in the presence of B and C, that he had made the deed to B and C in trust, and they did not deny it. *Held*, that these facts were clear proof that the deed was intended as a security merely.

Cause removed from the court of equity of Granville county, at the spring term, 1849.

On the 19th of June, 1843, the defendant, David Overby, granted to the plaintiff and John Lewis, for the term of twenty years, a lease of a gold mine, rendering as rent one tenth of the gold, with a stipulation, among others, that within two years Lewis might, if he chose, take the mine and forty acres of land adjoining it, in fee, at the price of \$1,600, whereof Overby should retain \$1,200 for himself and pay \$400 to the plaintiff. In a few months afterward Lewis and the plaintiff began to operate upon the mine separately, each one for himself. The plaintiff, being quite a poor man, was unable to procure any laborers besides himself and could do but little.

¹ *Pioneer Co. v. Baker*, 23 Fed. 258; *Whitsett v. Kershaw*, 4 Colo. 419.

After some time, however, it was agreed between him and the defendants, David Overby and John Overby, that the two latter should each furnish a slave to work under the plaintiff and that the three should divide the net gains equally; and under that agreement the plaintiff collected ore to some small value, perhaps about \$100. Soon afterward the plaintiff was pressed for the payment of about \$40, for which executions were in the hands of a constable, and he applied to the defendant David for it, who agreed to let him have that sum and did so in May, 1844. The bill alleges that the sum thus advanced to the plaintiff was a loan, and that it was agreed between him and the defendant David that the plaintiff should, as a security therefor, assign his interest in the mine, which was all the property he had. An instrument was then drawn up by an acquaintance of the parties, and executed by the plaintiff in the following words: "This instrument is the witness of an agreement or bargain made this — day of May, 1844, between John Blackwell, of one part, and John S. Overby and David Overby, of the other part, the conditions of which are as follows, to wit: The said John Blackwell, in consideration of the sum of \$40, to him in hand paid by the said, etc., doth bargain, sell and convey unto the said John S. and David, and their assigns, all his rights and interests, legal and equitable, in and to a certain gold mine and parcel of land situate, etc., which was conveyed by the said David to the said Blackwell and John Lewis by lease for the term of twenty years, upon the conditions in said lease specified. The said John Blackwell doth hereby for himself, his heirs and assigns, forever release, bargain, sell and convey to the said John S. Overby and David Overby, their heirs and assigns forever, all his interest and title in said lease to said gold mine, with all the privileges to him jointly with John Lewis conveyed by David Overby; also including his right and interest in and to the sum of \$40, conditionally to him, the said Blackwell, by David Overby to be paid, should Lewis make the contemplated purchase of Overby within two years. In testimony whereof the said Blackwell hath hereunto set his hand and seal," etc.

The bill states that the plaintiff was an illiterate person, able to read very little, and that he had implicit confidence in the integrity and friendship of the defendants, and was assured

by them that the instrument was only a security for the plaintiff's debt, and that he should have whatever might remain of the proceeds of the property when it should be sold after paying the said debt. Upon the faith thereof the plaintiff executed the deed or agreement without reading it or understanding it.

The bill further states that after executing the instrument the plaintiff continued in possession of the mine and worked the same with the two negroes of the defendants and himself upon their joint account, as he had done before; that he put the ore then raised with that which he had raised before the execution of the deed, and that he so continued to do until the defendant David made a contract with Lewis to sell him the interest in the lease, formerly belonging to the plaintiff, at the price of \$400, whereof \$100 was paid down and \$300 secured by a bond payable some few months afterward; that then the defendant John S. Overby made an indorsement on the deed in the following words—"1844, May 24th. I assign the whole of my interest in the within conveyance to David Overby," and the defendant David then granted the term to Lewis at the price above mentioned. Of the \$100 received from Lewis the defendants paid the plaintiff immediately the sum of \$60, thus reserving \$40, as the bill alleges, in satisfaction of the sum borrowed by the plaintiff from David Overby. Afterward the parties had the ore, to the value of about \$200 ground and the gold extracted; and, after paying the rent to David, and the expenses of grinding the ore, they divided the net proceeds equally, each share being nearly \$40. The defendant David subsequently collected the residue of the purchase money, and refused to pay any part of it to the plaintiff, claiming the whole as his own, absolutely, under the instrument executed by the plaintiff. The bill then charges, that if such be the nature of that instrument the plaintiff was induced by the defendants to execute it under a total mistake on that point; for they gave him explicitly to understand and believe that it was but a security for the debt he then contracted, and all parties so treated it afterward, until the refusal of the defendant David to pay to the plaintiff the residue of the purchase money given by Lewis. The prayer is, that the deed may be declared to be but a security for the plaintiff's

debt to the defendants, and the defendant David may be decreed to come to an account with the plaintiff for the sum for which he sold the lease to Lewis, and pay him what may be found due to him on that account.

The defendants put in a joint answer, and deny that at the time of the assignment the plaintiff was indebted to David Overby in the sum of \$40, or any other sum, except \$5, which they say is still due. They deny that the assignment was intended as a security for \$40, or any other sum; or that it was understood that the plaintiff's interest was to be sold and the proceeds applied to the satisfaction of any debt of the plaintiff and the surplus paid to him; or that the plaintiff was assured by either of the defendants, that the deed was merely a security for any sum of money, or that the plaintiff was ignorant of the contents and legal effect of the deed. On the contrary, the defendants say, that the plaintiff had before frequently offered to sell them his interest in the lease, and that the contract between them was for the absolute sale and purchase of his interest; that the reason which induced the plaintiff to sell his interest, was that he was obliged to raise money to meet several executions that were then pressing on him, to the amount of about \$40; that after they had bargained they applied to one Willie to draw the deed, and that he did so in the presence of the plaintiff and the defendants, and in pursuance of instructions received from them jointly, and then read it to them, and inquired whether it was in accordance with the agreement, and they all replied that they were satisfied with it; and that, in fact, the deed was intended and understood to be an absolute sale and assignment of the plaintiff's interest for the consideration therein expressed; and that the said price was applied at the request and by the direction of the plaintiff, in discharge of the said claims and executions.

The answer further states, that at the time of the contract, the defendants did not suppose the plaintiff's interest was of much value, or that it could be resold for much more than the defendants gave for it; and that Lewis was induced to give the price he did from peculiar circumstances which were, that the plaintiff continued after the assignment to mine with the defendant, as he had done before, and that his operations interfered with those of Lewis to such an inconvenient extent

that Lewis determined at once to purchase the interest formerly owned by the plaintiff, and thus put an end to the annoyance and collisions to which he was then subject; and he was thereby induced to make the purchase at \$400. The answer further states, that the defendant David put into the hands of the defendant, John S., the \$100 received in cash from Lewis, with directions to give it to the plaintiff; and the defendant John S. states, that by the direction of the plaintiff he applied thereof the sum of \$40 to the satisfaction of a certain claim which he held against the plaintiff for collection, as a constable, and that he paid the balance thereof to the plaintiff.

The defendant David states, that he sent the \$100 to the plaintiff simply as an act of kindness, and not because he was under any obligation so to do; and that his reasons for it were, that the plaintiff first discovered there was gold on the land and informed him of it, and that he had got a larger price for the interest than he had expected.

The material evidence is, that the plaintiff is illiterate and has little or no knowledge of the nature of conveyances, though with a natural capacity probably equal to that of the defendants; that in the spring of 1844, a constable, named Hart, had executions against the plaintiff for about \$35, which he was unable to pay, unless out of his interest in the mine; that Hart advised him, instead of having that levied on and sold under execution, to endeavor to borrow the money by making a deed of trust for his interest; and that soon afterward Hart saw the plaintiff and the defendant David together, at Granville court, the first week in May, and the plaintiff mentioned that he had taken his advice and made a deed of trust to the defendant David, who had agreed to pay the debt for him and was ready so to do; and that he, the said defendant, assented thereto, as the witness understood, and accordingly paid the executions for the plaintiff.

Another witness, Clark, states, that he had a note of the plaintiff on which near \$40 was due, and that he gave it to John S. Overby, as a constable, for collection; that some time afterward, and after the sale to Lewis, the defendant John S. paid the witness the debt; and both of the defendants told him that they (or we) had sold Blackwell's interest in the go'd

mine to Lewis for \$400, and that Lewis had paid \$100, out of which the debt to the witness was paid by Blackwell's directions; and that the defendant David said to the witness: "If it had not been before me, you would not have got your money."

Willie states that at May court, one of the Overbys applied to him to write a deed, conveying to the two Overbys from Blackwell his interest and title in and to the land and gold mine, and stated to the witness the terms of the contract, which were as expressed in the deed; that he drew the deed, and read it to the two Overbys, and also to Blackwell, he thinks; and asked them if they were satisfied, to which Overby said it was just what he wished, and Blackwell made no objection. The witness went away before the deed was executed.

The deed is not dated of any particular day in May, and is attested by two other persons, neither of whom was examined.

McRAE and T. B. VENABLE, for the plaintiff.

GILLIAN & LANIER, for the defendants.

RUFFIN, C. J.

Although the form of the instrument is very strong evidence that an absolute deed was intended as a conveyance upon a purchase, especially when supported by an answer, yet it has been often held not to be conclusive. It can not, indeed, be met by parol evidence, merely, of an agreement at the time for a mortgage. Nor can it be repelled by any evidence which is not clear and cogent. But proof *dehors* of facts and circumstances, which, to the apprehension of men versed in business and judicial minds are incompatible with the idea of a purchase and leave no fair doubt that a security only was intended, has been deemed sufficient to let in the apparent vendor to redeem. The leading case in our courts is that of *Streator v. Jones*, 3 Hawks, 423. The question of evidence and of equity were there much discussed, and it was ruled that the distresses of the maker of the deed, proposals for a loan, great disparity between the sum paid and the value of

the estate, the possession continuing afterward as before, an accounting between the parties as if vendee were still a creditor, and the vendor had still an interest in the property, and the like, were facts constituting a body of evidence as to the real purpose of the deed, stronger than the form of the instrument and the oath of an interested person. That case was followed by *Kimborough v. Smith*, 2 Dev. Eq. 558; *Hauser v. Lash*, 2 Dev. & Bat. Eq. 212; *Howlet v. Thompson*, 1 Ired. Eq. 369, and several others of the same effect.

For, although deeds must be presumed to speak the truth, yet we know that in reality instruments intended to be but securities are sometimes put into the form of absolute conveyances, from the ignorance of the writer, the mistake of the parties, great confidence on one side and undue advantage taken on the other of the necessities of a distressed and dependent man. Therefore, in such cases, courts must consider the circumstances in the hope of discovering the true character of the transaction; and such circumstances as those enumerated have been held to amount to clear and cogent proof—which is necessary—either that the agreement was for a security only, or that the bargain was a hard and unconscientious one, and relief given accordingly.

This case has every material ingredient on which the equity was sustained in those cited, and others equally strong. The first—always deemed the most material—is a gross inadequacy of the money paid as a price, being just one tenth of the value. Ten times the price was got for the mine almost immediately after the deed; and, therefore, the value at the time may properly be thus estimated. It is true the answer says that the sale to Lewis was for much more than the parties expected and more than the value; but, as the case stands, that account can not be credited. The defendants have not examined Lewis in support of their answer as to his motives for buying, nor proved by him, or any one, that the value was less than the price he gave. Indeed, the original lease fixed on the very sum which Lewis did give, as that he should give in case he chose to buy within two years; and the operations of the plaintiff, after the deed, were no greater annoyance to Lewis than they had been before. Consequently the price given by Lewis must be taken as the value; and it seems im-

possible that a man in his senses and with a free will, could agree to sell out and out, for \$40, property, for the sale of which he had contracted conditionally at \$400, and which in three weeks was finally sold at that price to the person who had before contracted for it. It is further admitted in the answer that the plaintiff was in great distress for a small sum of money.

The defendants say that for that reason he had often offered to make a sale to them. But there is no proof of that assertion, and there is evidence that he wished to borrow the money upon the security of this property. There is, indeed, no direct evidence of the negotiation between the plaintiff and the defendant, which was to themselves, and does not seem in its particulars to have been communicated to any person. It is true that Willie says Overby stated to him the terms of the contract; but he does not give them to us further than merely saying, "they were expressed in the deed;" which is certainly very unsatisfactory, and amounts only to this, that he wrote the deed according to his understanding of the terms. He should have given us the words of the parties so that the court could see whether, the instrument conformed to the contract, or whether the true nature of the contract, in respect to the important point now investigated, was at all explained or understood by the witness. The defendants ask him no questions on that point, but leave the case upon the vague terms used by that witness. The truth probably is that the witness, as a neighbor and not an adviser, was asked to write a deed for the parties, and that he did not think of inquiring whether it was founded on an agreement for a sale, or for a security, nor they of communicating. The understanding of the matter by the witness, separated from the facts on which it was founded, is entitled to very little weight, as the instrument itself shows that he had but a slender capacity for the task he undertook beyond merely writing legibly. The testimony of the writer of the deed, therefore, leaves the case much as it would be without it and upon the paper by itself. Then it is clear that the price, or alleged price, was not paid at the preparation or the execution of the deed, nor any security given for it. The defendants have given no evidence of it and have not thought proper to examine either of the subscribing witnesses. On the contrary, it is proved that David Overby paid it afterward to the constable

in discharge of the executions against Blackwell and in his presence; the latter saying, at the time, that he made Overby a deed of trust for the mine, and the other not disputing it. There is also something singular in the fact that the deed is made to John S. Overby as well as to David; inasmuch as he does not appear to have paid any part of the \$40 mentioned as the consideration, and he assigned his share to David without value, as far as is expressed in the assignment or shown by proof, and he got no part of the price paid by Lewis, excepting that he retained out of the money received from Lewis enough to satisfy a debt in his hands, as constable, for collection. It is under such circumstances much more than simply a conjecture that he became a party to the deed mere'y to obtain a security by way of indemnity from loss for indulging the plaintiff on Clark's debt, and therefore, when he got payment of that debt, he gave up all claim under the deed, and assigned his naked legal title to David, in order that he might make a clear conveyance to Lewis. This is fortified by the fact that upon the execution of the deed by the plaintiff, John S. Overby did not discharge nor take on himself the plaintiff's debt to Clark; but he waited until the sale of the mine to Lewis, and paid the debt out of the price, both of the defendants saying that they had sold Blackwell's interest to Lewis. It would seem, then, almost certain that John S. Overby was not a purchaser in this transaction; and it follows that the other defendant also was not one.

The circumstances hitherto adverted to receive great additional force from the indisputable facts, that after the deed the plaintiff continued in possession, taking the profits, as he had done before, and that upon the sale to Lewis the defendants accounted to him for the money received. The possession, it is true, was but for a short period; but it continued up to the sale to Lewis, and that alone was the reason for its termination. But the continuing in possession at all of a gold mine, after the deed, without a new contract, creates a strong presumption that the sale was not absolute.

If it had been, the vendor could not have thought of working the mine afterward; but he would have been stopped instantly, just as the plaintiff and the defendants all did, as soon as a real sale was made to Lewis. The other fact, that the defendants paid the plaintiff the money received from Lewis,

upon the sale, puts the matter beyond doubt, if any remained. Unexplained, that act, concurring in tendency with the other circumstances, completes the evidence so as to make it irresistible. The defendants felt the force of it, and, when they could not deny, endeavor to avoid it by saying that it was a gratuity. But there is not the slightest proof in support of the averment. They do not show that they accompanied the payment with any declaration of the kind, so as to afford some presumption that the plaintiff received the money on those terms. The payment, therefore, must naturally be taken to have been made on an acknowledged right of the plaintiff to the money, agreeing with the defendant's declaration to the witness, that the money was got for the plaintiff's interest in the mine; and, upon the whole, the case seems a strong one for holding, upon presumptions arising from undoubted facts, that the deed was unduly obtained in this form, and declaring that it was intended as a security only. Confirming the sale, as he does, the plaintiff is entitled to the proceeds, deducting what he may owe the defendants or either of them on prior debts or for advances for him after the deed; and it must be referred to make the usual inquiries on those points.

Decree accordingly.

PER CURIAM.

VERVALEN V. OLDER ET AL.

(8 New Jersey Equity, 98. Court of Chancery, 1849.)

Dissolving injunction on denial of bill—Mortgagor of quarry may work.

Injunction against a mortgagor restraining him from quarrying on a quarry lot, half of which had been conveyed as such to him by the mortgagee, and to secure the consideration for which conveyance the mortgage was given—*dissolved* on answer denying the charges in the bill, which charges intimated that the defendant was impairing the value of the mortgaged premises and endangering the security.

¹ It is not waste to properly work a quarry.

¹ *Capner v. Flemington Co.*, 7 M. R. 264; *Angier v. Agnew*, 98 Pa. St. 587; 42 Am. R. 624; *Young v. Northern Co.*, 10 M. R. 596; *Irwin v. Davidson*, 7 M. R. 237.

The bill, filed November 19, 1849, is for the foreclosure of a mortgage, dated February 24, 1845, given by Obadiah Older and Margaret, his wife, to Richard Vervalen, the complainant, of the equal and undivided one half part of a stone quarry, lying at the edge of the Hudson river, and particularly described in the bill, to secure the payment of a bond of the same date, executed by the said Obadiah Older to the complainant, in the penal sum of five hundred dollars, conditioned for the payment of \$250, as follows: \$100 on the 24th of February, 1847, \$100 on the 24th of February, 1850, and \$50, the residue, on the 24th of February, 1851, with interest yearly on each payment from the date of the bond, at five per cent. a year; and it was provided in the condition of the bond, that if any default should be made in the payment of any of the said sums, or of the interest, at the specified time for payment then that, after such default, that part of the principal of each payment that should be unpaid at the specified time, with all arrearages of interest thereon, should, at the option of the complainant, become and be due and payable immediately thereafter.

On the 20th of December, 1847, the interest was paid in full up to that date, and \$34.19 of principal; and on the 5th of January, 1848, a payment of \$65.80 of principal was made, and no other payment, either of principal or interest, had been made.

The bill claims that by reason of default in not making the first payment at the time specified in the condition of the bond, and of default in the non-payment of the yearly interest which had accrued, the whole of the principal sum mentioned in the condition of the bond, except the sums paid as aforesaid, was due and payable at the time of filing the bill, with arrears of interest thereon.

The bill states that the premises covered by the mortgage are situated under what are called the Palisades, on the west shore of the Hudson river, and that the only value thereof consists in the stone with which they are covered and of which they are composed; that quarries have been opened on the said premises, and large quantities of stone have been taken therefrom and sold.

The said Obadiah Older has, since the giving of the said

mortgage, associated with himself in working said quarries, on terms the particulars of which are unknown to the complainant, whereby they claim to have an interest in the said premises, Joseph Dubois and John J. Vervalen, they knowing the existence of said mortgage; and that the said Obadiah, Joseph and John, with their workmen and laborers, are employed in getting out, carrying away, and selling stone from the said quarries on the mortgaged premises; and that by reason thereof the security of the complainant has become lessened, and the complainant is in danger of losing his security altogether, if they, the defendants, continue to work the said quarries, by the same becoming exhausted of all their stone. And that the mortgaged premises are a slender and scanty security for the principal and interest moneys due the complainant on his said bond and mortgage.

The bill prays a decree of foreclosure, or for the sale of the mortgaged premises; and also prays an injunction restraining the defendants from committing any further waste or destruction upon the mortgaged premises, by digging, excavating and blasting stone and rock, or carrying, removing or selling the same from the said premises.

On the reading and filing of this bill the injunction prayed was allowed.

The defendant Older put in his several answer, in which he says, that no part of the first installment of \$100, which became due on the 24th of February, 1847, is due, and avers that the whole of said installment has been paid by him and received by the complainant; and he further says, that all the interest due on the said installment, and also all the interest due on the residue of the principal money secured by the said bond and mortgage, until the 20th of December, 1848, was paid by him to and accepted by the complainant, and that no part thereof is now (at the time of putting in his answer) due from him to the complainant; and that he, this defendant, is in no default whatever in the payment of any principal or interest due according to the condition of the said bond and mortgage, the said complainant having, on the 20th of December, 1848, accepted the interest due on the whole of said sum to that date and thereby made the yearly payment of interest to begin from that date.

He admits that the only use and value of the premises is for quarrying stone. He denies that he has in any way associated with him in the working of the said quarry, the defendants, Joseph Dubois and John Vervalen, or either of them, but says that the said Joseph and John work on said quarry in their own right, claiming to be owners of the other undivided half thereof, as this defendant is informed and believes, by virtue of a deed from the complainant, in fee, for such other undivided half.

That this defendant, as owner of one undivided half of said quarry in fee, made partition thereof with the said John and Joseph, on or about May 28, 1849, by virtue of which the north half thereof was released and assigned to the said John and Joseph in fee, and the south half thereof to this defendant, but that the said John and Joseph derive their title to the said lot from the complainant, and not from this defendant; and that this defendant does not work or quarry on the lot so assigned to them, nor do they work on the part so assigned to them.

He says that the premises were conveyed to him by the complainant, by deed dated February 22, 1845, for the consideration of \$250, by the description and appellation of a stone quarry lot, and that the complainant's mortgage was given to secure the payment of the said consideration money. That said premises were sold to this defendant to be used as a quarry, and to be worked immediately by him, the same being the only use that could be made of the same; and that the payment of the said consideration money was on purpose and advisedly, by express agreement, made in small sums and at distant periods, so that this defendant, who is a laborer and a quarryman, and poor, and without any other means of payment, might earn, by his labor and industry in working said quarry, the means of paying said installments as they should become due; and that it was well understood and expressly agreed, at the time of said purchase and the giving of said mortgage, that defendant should forthwith begin and continue to work said quarry; and without such understanding he would not have bought nor the complainant have sold to him, as he would have had no ability to pay.

That since the said purchase and the giving of the said mort-

gage, he has expended a large sum of money in permanent improvements on said property; that he has erected thereon a dock for the landing of vessels and certain fixtures called ways for the conveyance of heavy stone from the steep banks or palisades to the vessels at the docks, and that said machinery and docks have cost and are worth over \$200 and are an improvement of the value of the premises to that amount.

He admits that he has quarried and carried away stone, but says that what he has taken out has not at all lessened the value of the quarry, the work as yet done having made said quarry more accessible and valuable.

That for the last nine months he has not worked said quarry to any extent, having taken out only some seven boat loads during that time.

That said quarry would not be half exhausted in fifteen years, by the taking away stone in the most rapid way it has ever been done by this defendant, or by all the means at present at his command to work the same.

That the complainant, or any one for him, had never asked this defendant to pay the money secured by said mortgage, or the interest thereon, or any part thereof, nor requested him to desist from working in said quarry; and that the security of the complainant is not at all endangered by the manner in which this defendant had worked said quarry, and was continuing to work and designed to work it; but that this defendant has greatly added to the value of said property by his improvements on the same.

That since the filing of complainant's bill, this defendant, though he knew that no principal or interest was due, yet, to avoid costs of litigation, procured and tendered to the complainant the principal sum of \$150, and all interest accrued thereon, remaining unpaid on said bond and mortgage, in good bank bills of banks in the city of New York, to which bills the complainant did not object; and that the complainant refused to receive the same unless this defendant also paid to him the costs incurred by him in filing his said bill and procuring the said injunction.

The other two defendants put in their joint and several answer.

They say they have not in any way been associated with said Obadiah Older in the working of said quarry; but that the complainant, by his deed, dated August 27, 1847, conveyed to them in fee an equal undivided half part of the middle portion of said quarry tract of four acres, for \$150; the other undivided half of said tract being then held by the said Obadiah Older, by virtue of a prior conveyance from the complainant; and that said deed to these defendants contained the usual covenants of warranty, for quiet enjoyment, further assurance, and against incumbrances; and that all the quarrying done by these defendants on said stone quarry tract was done on said portion so conveyed to them by the complainant under and by virtue of said title so derived from the complainant, and not by virtue of any agreement or association with said Obadiah Older. That these defendants, being, together seized of one undivided moiety of said lands as tenants in common with said Obadiah Older, under titles derived from the complainant, did, by releases, on the 28th of May 1849, assign the metes and bounds of each half share, the north half being assigned to these defendants, and the south half to the said Obadiah Older, of the said portion of the said quarry tract so conveyed to these defendants.

They deny that they or either of them have quarried any stone from the half of said Obadiah Older in said premises. And deny that the value of said quarry lot has been impaired by any quarrying or taking away stone by them or said Older; but say that all the quarrying as yet done on either part has only made the quarry and stone more accessible, and the quarry more valuable, besides and independent of permanent improvements and fixtures to the value of more than \$200, put on the said lot by the said Obadiah Older.

On these answers a motion was made to dissolve the injunction.

A. O. ZABRISKIE, in support of the motion. He cited Drury on Inj. 136, 163; 2 Green's Ch. 467; 1 Halsted's Ch. Rep. 397.

R. K. PAULISON, *contra*. He cited 1 Jac. Law Dict. 357.

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that can be made of the ground described in the bill, and the complainant sold to the defendant the undivided half of it as a quarry lot; the proper use of it as such can not be considered waste; and the answers deny all those charges in the bill from which it might be inferred that the defendant was improperly impairing the value of the mortgaged premises and endangering the complainant's security. The injunction will be dissolved.

Order accordingly.

HANCOCK V. WATSON ET AL.

(18 California, 138. Supreme Court, 1861.)

¹ Description in mortgage—Parol identification. A mortgage in which the mortgaged property is described as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one half of the mill and lode," is not void for uncertainty, it being possible to identify the property by resorting to extrinsic facts.

Rule of construction. A grammatical construction is not always to be followed, but that construction is always to be adopted which will accomplish the object for which the instrument was executed.

Extrinsic evidence to explain deed. For the purpose of applying the instrument to the facts, and determining what passes by it and who takes an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence.

Appeal from the Eleventh District.

Action to foreclose a mortgage on a quartz mill and lode against the mortgagors and Duck & Sanders, who are subsequent purchasers of the property under execution sale. The complaint describes the mill and lode more minutely than it is described in the mortgage, locating them at Bath, formerly called Sarahsville, Placer county, and avers that this is the same property described in the mortgage. The decree for plaintiff follows the description in the complaint—the court below having permitted plaintiff, against defendant's excep-

¹ *Tibbetts v. Moore*, 9 M. R. 348; *Field v. Beaumont*, 7 M. R. 257; *Curnor v. Happy Valley Co.*, 9 Pac. 146.

tion, to introduce parol testimony to identify the property. The witnesses for plaintiff, among whom was a subscribing witness to the mortgage, proved that when the mortgage was given the matter was talked over, and that it was intended to mortgage a certain quartz mill and lode near the town of Bath, formerly called Sarahsville, Placer county, and that this mill was known as the Hancock mill and lead until Watson bought an interest, and then it was known as the Hancock and Watson mill and lead; and that this was the only mill and lead Hancock owned at or near Bath, etc.; that defendants Duck & Sanders had said before they acquired any interest in the property, that plaintiff had a mortgage on this mill near Bath, but doubted whether it was good; that the mill and lead had been generally known in the neighborhood since 1853. Defendants appeal.

TUTTLE & HILLYER, for appellants.

THOS. H. WILLIAMS and HALE & SMITH, for respondent.

COPE, J., delivered the opinion of the court, BALDWIN, J., concurring.

This is an action to foreclose a mortgage upon the undivided half of a quartz mill and lode situated in Placer county. The property is described in the mortgage as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one half of the mill and lode." The only question presented relates to the sufficiency of this description. The appellants contend that it is so defective and uncertain as to render the mortgage inoperative and void. The respondent claims that although defective, it is sufficient to entitle him to resort to extrinsic evidence to establish the identity of the property. His right to do this is the turning point, and the only subject of inquiry in the case. Of course, this evidence is not admissible to bring within the operation of the mortgage any property not referred to. It can be used for no other purpose than to assist the court in arriving at the intention of the parties as expressed in the mortgage itself. It is argued by counsel that there is nothing in the description, grammatically construed, which amounts to a designation of the mill and

lode in any manner, whatever. They contend that the words "formerly owned," etc., refer to and qualify the word "interest," and can not be regarded as descriptive of the mill and lode. But the idea of separating the description of the interest from that of the property in which the interest was owned, would seem to be impracticable. Unquestionably, no one can read the description without receiving as distinct an impression in regard to the whole property as to the interest mortgaged, and as against this obvious effect of the description no particular collocation of its words can or ought to prevail. A grammatical construction is not always to be followed, and it has been well said that neither false English nor bad Latin will make void a deed when the meaning of the party is apparent. In construing an instrument, that construction is always to be adopted which will accomplish the object for which the instrument was executed.

This view appears to us to be decisive of the case. It is not pretended that the description in the mortgage is inaccurate. The objection is to its sufficiency, and this objection is based upon the ground of uncertainty as to the property referred to. But *certum est quod certum reddi potest*, and if, pursuing the terms of the description, the property can be identified by resorting to extrinsic facts, there is no foundation for the objection. The question is not whether the mortgage ought to be enforced, but whether it can be; and the law will not pronounce an instrument hopelessly uncertain until forced to do so, after exhausting upon it all the light to be gathered from contemporaneous facts. The rule in relation to the admissibility of extrinsic evidence in such cases was clearly and accurately stated by Parke, B. in *Shore v. Wilson*, 9 Cl. & Fin. 556. "For the purpose," said he, "of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence." Parsons, in his work on Contracts, says the law will not stop in the endeavor to remove uncertainty, until it is found that the instrument must be set aside and another one

substituted before certainty can be attained. 2 Parsons on Cont. 74.

The facts relied upon in this case are entirely consistent with the description in the mortgage, and establish beyond controversy the identity of the property.

Judgment affirmed.

HALSEY V. MARTIN.

(22 California, 645. Supreme Court, 1863.)

¹**Absolute deed with written defeasance—Effect of transfer of mortgagee.** The conveyance of an interest in a mining claim by a deed absolute in form, will constitute a mortgage if the grantor at the same time take back a written defeasance, and if the grantee re-convey the premises such conveyance will constitute an assignment of the mortgage.

²**Equity of redemption subject to sale.** The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure.

Plaintiff in ejectment may recover less than declared for. The plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for.

Appeal from the Fifth Judicial District.

The facts are stated in the opinion of the court.

H. P. BARBER, for appellant.

H. O. BEATTY, for respondent.

CROCKER, J., delivered the opinion of the court, COPE, C. J., concurring.

This is an action to recover the possession of seven seventeenths of a quartz lead known as the "Alice and Emily Quartz Lead," on the north bank of the South Fork of the Stanislaus river, in Tuolumne county. The plaintiff claims as

¹ *Hickox v. Lowe*, 10 Cal. 197.

² The debtor may mine pending redemption: *Ward v. Carp River Co.*, 47 Mich. 65; 50 Id. 522.

vendee of the purchaser under a sheriff's sale on execution on a judgment rendered in a suit in which the interest in the lead of one Kyle, the judgment debtor, was attached on the first day of February, 1860. It seems that Kyle, on the fourteenth day of November, 1859, had conveyed to H. O. Beatty two shares of the lead, equal to two seventeenths, by an absolute deed of conveyance, taking back a written defeasance, which shows that the deed to Beatty, though absolute in its terms, was substantially a mortgage. Beatty, in November or December, 1860, conveyed these two shares to the defendant Martin, by a deed absolute in its terms. On the trial a writ of attachment, issued in the action against Kyle in which the judgment was rendered, was introduced in evidence, with the written answer of Martin appended thereto, as garnishee, bearing date February 1, 1860, stating that he had then four shares in said claim in his possession, belonging to Kyle. The complaint avers that the defendants are in possession of the interest claimed by him, against his will and consent; that they refuse to surrender the possession and deny his right thereto, and refuse to recognize him as having any interest therein. The answer of Martin admits that he is in possession, and the other allegations above referred to are not denied. When the plaintiff had closed his evidence, the court, on the motion of the defendants, granted a non-suit; the plaintiff moved for a new trial, which was refused, and he appeals from the judgment of non-suit and the order denying a new trial.

The court erred in granting the non-suit. There may be some question as to the number of shares in the lead owned by Kyle at the time of the levy of the attachment, but it is evident that he had an interest in the two shares mortgaged to Beatty, liable to the attachment. He held the equity of redemption and the right of possession until the foreclosure and sale under the mortgage, which was such an interest as could be attached, and which interest was conveyed to the plaintiff, by the deed to the purchaser at sheriff's sale, and the deed of the purchaser to him. The deed from Beatty to Martin was after the levy of the attachment, and merely conveyed the interest the former had in the two shares, which was only that of a mortgagee, and it amounted substantially to an assignment

of the mortgage. Thus, Martin held these two shares subject to the equity of redemption in Kyle, and those holding under him, claiming under the attachment. His title as mortgagee gave him no right to the possession as against the plaintiff. Martin was in the possession, denying the plaintiff's claim and setting up an adverse title. These acts amounted to an ouster of the plaintiff, which gave him a right of action against him to recover possession to the extent, at least, of these two shares.

The judgment is reversed and the cause remanded.

REDMAYNE V. FORSTER.

(L. R. 2 Equity Cases, 467. The Rolls Court, 1866.)

Foreclosure and not sale is the remedy of an equitable mortgagee of a share in a mining partnership.

¹ Pre-emption arrangement between partners—Account with foreclosure.

The articles of a mining partnership empowered any partner to sell or dispose of his shares but gave a right of pre-emption to the other partners. R., one of the partners, made an equitable mortgage of his shares, which was assented to by the other partners, and afterward sold the shares to M., one of the company. *Held*, that all the partners were necessary parties to a suit for the foreclosure of the mortgaged shares; that in default of redemption by M., the other partners were entitled to take the mortgaged shares on payment of the mortgaged debt; that in default of redemption by M. or the other partners, the mortgagee was entitled to foreclosure and to an account of the profits of the partnership, made after the filing of the bill, and of the existing debts and liabilities of the partnership, and to have the share of such debts and liabilities attributable to the mortgaged shares, ascertained.

This was a suit by an equitable mortgagee of shares in a mining partnership for the purpose of realizing the security.

In 1831, Braddyl, Matthew Forster, and Green, entered into partnership under the name of the South Hetton Coal Company, for the term of forty-two years, for the purpose of working certain coal mines. The partnership deed provided, amongst other things, that the capital should consist of the mines and the buildings, plant, etc., and of £96,000 in money,

¹ *Weisman v. Smith*, 11 M. R. 152; *Sibley v. Minton*, 27 L. J. Ch. 53.

or so much thereof as might from time to time be necessary for the purposes of the partnership; that the capital should be considered as divided into sixty-four equal parts, which the partners should subscribe for, and be entitled to, in the proportions therein mentioned; that each partner should pay up his proportion of the capital by installments at the times and in the manner therein mentioned; that no partner should be allowed to claim any of the profits or bonuses, or exercise any right by virtue of the partnership deed, until he should have paid the amount of every call in respect of his shares; that if any of the partners for the time being, except Braddyl, as to whose shares the deed contained special provisions, should desire to sell or dispose of any shares, he should offer them, at a price to be fixed as therein mentioned, first to Braddyl, and then to the other partners, and that in the event of all the partners declining to purchase them, the shares might be sold to any other person; that any purchaser or other person to whom any shares should be sold or assigned, should execute a deed whereby he should covenant to abide by the provisions and agreements contained in the partnership deed, and until he should have executed such deed of covenant, should not be considered a partner as to any profits, rights, privileges, benefits and advantages to arise from the shares sold or assigned to him, but should be considered a partner as to all duties, obligations, claims and demands, in respect of such shares, from the time of his agreement to purchase them; and that the partnership should not be dissolved by the death of any partner, but should be continued by the survivor or survivors, in conjunction with the executors or administrators or legatees of the deceased partner, upon the same terms.

Between 1831 and 1838, Burrell, Rawsthorne and Walker purchased shares in the partnership, and in January, 1838, the six partners executed a deed, extending the term of the partnership to sixty-three years from that date, upon the terms of the deed of 1831; at that time Braddyl held thirty-two shares, Forster seven, Green five, Burrell five, Rawsthorne nine and Walker six.

Before 1845 the partners had paid up, in proportion to the number of their shares, considerably more than £96,000.

In March, 1845, Rawsthorne, who was the solicitor of the

partnership, made an equitable mortgage of five of his shares, by deposit of the deed, by which the shares had been assigned to him, to Giles Redmayne, for securing £12,000 and interest.

By a deed dated the 16th of September, 1847, between Rawsthorne of the one part, and Percival Forster, the manager of the colliery, of the other part, Rawsthorne assigned his nine shares to Percival Forster, subject to a proviso for redemption on payment to P. Forster, as manager, of what might be found due from Rawsthorne to the partnership in respect of certain bills of exchange; and also on payment to Green, to whom Rawsthorne had mortgaged his other four shares—and to Redmayne of their respective mortgage debts; and the deed empowered Percival Forster, in default of payment of what might be found due to the partnership, to sell the shares—subject to the right of pre-emption on the part of the other partners reserved by the partnership deed—and declared the trusts of the purchase money to be for the payment of the amounts respectively due to Green, Redmayne and the partnership, and the payment of the balance to Rawsthorne.

Percival Forster did not execute this deed, but on the 30th of September, 1848, he wrote to Redmayne a letter in these terms:

“I beg to inform you that I have received no notice of any incumbrance affecting Mr. Rawsthorne’s shares in South Hetton colliery, except a conveyance, dated 16th September, 1847, of such shares to me in trust to secure Mr. Green, yourself and the colliery what he respectively owes to them; and I also further beg to state that I shall not part with such conveyance until I receive your written assurance that the principal and interest owing to you are satisfied; nor shall I pay any part of the profits of the shares without communicating with you, such shares, as far as I am aware, being subject to no liability, except as between the partners, for the calls payable in respect of them. I give you this information at Mr. Rawsthorne’s request, and for your satisfaction.”

The deed of the 16th of September, 1847, was found in the custody of the partners when this suit was instituted, and they could give no account of the time or manner of its coming into their custody; but there was some evidence to show that they had notice of it shortly after its execution. In

1846, Braddyl being insolvent and having incumbered his shares, and the partnership being subject to liabilities estimated at £260,000, an arrangement was made between Braddyl and his incumbrancers and the other partners, including Rawsthorne, by a deed dated the 9th of September, 1846, whereby the other partners agreed to pay and satisfy Braddyl's share of the liabilities of the partnership, and all calls or other moneys, which otherwise might or ought to be made upon, or provided for by him in respect of his shares; and it was agreed that the other partners might sell Braddyl's shares, and apply the purchase money in the first instance in payment of such calls or moneys, and that in the mean time the profits of the shares should be applied in payment, first, of certain bills of exchange drawn by Braddyl upon the partnership, next, of certain incumbrances upon his shares, and next of the moneys so to be paid by the other partners in respect of his shares.

The shares were to be sold at a valuation to be made at the time of the sale, and such valuation was to be made without reference to any debts or liabilities then affecting the partnership.

By an agreement dated the 13th of August, 1847, between Matthew Forster, Green, Burrell, Rawsthorne and Walker, it was agreed that seventeen of Braddyl's shares should be taken by Matthew Forster, four by Burrell, and one by Green, at a price therein mentioned, free of existing debt; that the five parties to the agreement should be liable for the existing debt of the partnership in proportion to their original shares; that the purchase money for the shares taken under the agreement should be paid by installments on each share equal to the calls which should be paid by the parties on each of their original shares; that the ultimate balance, if any, due in respect of the price of the shares so taken, after all calls on the original shares should have been paid or discharged, should be set off against the profits of the shares so taken; and that, as between the parties to the agreement, each original share and each of the shares so taken should make the holder liable to all debts incurred subsequently to the agreement.

By another agreement between Braddyl, his incumbrancers, and the other partners, dated the 18th of February, 1849, the sale of Braddyl's twenty-two shares to Matthew Forster, Bur-

rell and Green, was confirmed, and it was agreed that the sale of his ten remaining shares should be postponed until October, 1853, and that the profits on the ten shares in the meantime should be subject only to payment of the interest on the balance of his share of the debts of the partnership, after deducting the price of the twenty-two shares sold.

By a deed dated the 13th of May, 1850, between the partners, other than Braddyl, it was agreed that three of the shares taken by Burrell under the agreement of August, 1847, should be given up by him and taken by Matthew Forster on the same terms; that is to say, free from debt existing on the 13th of August, 1847.

In October, 1847, Matthew Forster assigned one of his shares to Percival Forster, the younger. In 1850 Rawsthorne sold his nine shares to Matthew Forster; and by a deed dated the 8th of November, 1851, to which Green, Burrell and Walker were parties, these shares were assigned to Matthew Forster, subject to the liabilities of the partnership and to the claims of Green and Redmayne.

In 1858 Braddyl's ten remaining shares were sold and transferred to Matthew Forster, who afterward assigned one of such shares to Burrell and one to Green.

In every year, except three, between 1845 and 1860, the collieries were worked at a profit, but no profits were divided, the whole having been expended in improving and extending the colliery, and in keeping down the interest on the debts of the partnership; and calls were made during that period, by agreement between the partners, amounting to £3,450 per share. The greater part of these calls had not been paid by Rawsthorne, and his shares had been debited with the unpaid calls with compound interest.

Redmayne was not a party to, and had no notice of, any of the transactions between the partners. He died in 1857. The whole of his mortgage debt, with a considerable arrear of interest, was due to his estate.

Rawsthorne died insolvent in 1854; Green died in 1858.

In 1860 Redmayne's administratrix filed the bill in this suit against Percival Forster, Braddyl, Matthew Forster, Burrell, Walker, the executors of Green, and Percival Forster, the younger, praying that an account might be taken of what was

due to her upon the mortgage; that proper directions might be given for making the five mortgaged shares available to pay the debt; that an account might be taken of the dealings of the partnership, so far as might be necessary for ascertaining and adjusting the equities between the plaintiff and the defendants; and that it might be declared that calls made after the date of the mortgage, by virtue of any new agreement made after that time without the consent of Redmayne, were not chargeable to the mortgaged shares as against the plaintiff, and that as between the plaintiff and the defendants the thirty-two shares which formerly belonged to Braddyl were subject to bear equally with the other shares their ratable proportion of the debts, liabilities and losses of the partnership.

Burrell died after the institution of the suit, and his executors were made parties by amendment.

The defendants, by their answers, insisted that the plaintiff could only stand in the place of Rawsthorne, and was bound by all the arrangements between the partners, and that the shares, as against her, were chargeable with the unpaid calls; and they produced accounts showing that the amount of the unpaid calls far exceeded the value of the shares.

The executors of Burrell and Green also insisted that, having regard to the provisions of the partnership deed, Rawsthorne had no right, as between himself and the other partners, to mortgage his shares; that the plaintiff was, by the provisions of the partnership deed, precluded from suing until she had paid the calls due in respect of the mortgaged shares; that her remedy (if any) was against Matthew Forster alone, and that the accounts of the partnership could not be taken in this suit.

The plaintiff alleged that the accounts of the partnership had been so kept as to relieve the holders of the shares originally held by Braddyl from their proper share of the liabilities of the partnership, and that the purchase money of those shares, and the calls made since 1846, on the other shares, instead of being applied in discharge of the previously existing liabilities, had been expended on the collieries. This, however, was denied by the defendants, who asserted that such purchase money and calls had been applied, so far as they would go, in paying off the debts existing in 1846. Both

parties relied, in support of their respective views as to this question, upon the accounts furnished by the defendants, which were extremely complicated.

THE ATTORNEY GENERAL (Sir R. PALMER,) Mr. COLE, Q. C., and Mr. WICKENS, for the plaintiff.

Sir H. CAIRNS, Q. C., Mr. BAGGALLAY, Q. C., and Mr. BEDWELL, for the Forsters and Walker.

Mr. SELWYN, Q. C., and Mr. SIMPSON for the executors of Burrell and Green.

THE ATTORNEY GENERAL in reply.

LORD ROMILLY, M. R.

This case was argued at great length and very elaborately, but I think it unnecessary to go through all the facts of the case for the purpose of explaining the decree I think it proper to pronounce. Shortly the facts may be stated thus: a company was formed, or rather an old company was remodeled, in January, 1838, for the purpose of working certain collieries; it was divided into sixty-four shares, of which Braddyl held thirty-two, Rawsthorne nine, Matthew Forster seven, Green five, Burrell five, and Walker six.

In March, 1845, Rawsthorne mortgaged five of his shares to Redmayne, who is now represented by the plaintiff, and he also mortgaged the remaining four to Green. In 1847, Percival Forster was the manager of the collieries, and by a deed of the 16th of September, 1836, Rawsthorne assigned his nine shares to Percival Forster, subject as to five to the mortgage to Redmayne, and as to the other four to the mortgage to Green, upon certain trusts stated in that deed. Percival Forster did not execute the deed, but by a letter in September, 1848, he accepted the trusteeship, and he undertook to hold the shares upon the trusts thereby imposed upon him, and not to deal with the shares in any way, except after notice to Redmayne. In 1850, Rawsthorne sold his nine shares, subject to these mortgages, to Matthew Forster. In 1846, Braddyl became insolvent, and under various deeds,

which I am not going to state in detail, twenty-eight of his shares became vested in Matthew Forster, two in Green, and two in Burrell. This was finally accomplished in 1858. A long argument has been addressed to me as to the proper construction to be put upon the four deeds in question, which bear date respectively the 9th of September, 1846, the 13th of August, 1847, the 18th of February, 1849, and the 13th of May, 1850, and the question arises in this way: all Brad-dyl's shares were to be sold, and were sold, although at different periods of time, as free shares; that is to say, they were sold as not liable to contribute toward the moneys due for working the collieries previously to the date of such sale, but the holders were to be liable to contribute their ratable proportion of what might be subsequently required for the due working of the collieries, and the purchase moneys derived from the sale of the shares were to be applied in paying the moneys due from the former holder of the shares in respect of the previous expense of the collieries. Now if these shares had been sold to strangers, it would probably not have given rise to much difficulty; it would have been easy to distinguish the rights of the holders, and to take the accounts between them and the former proprietors; but they were all bought by former proprietors, and in consequence of this a confusion has arisen as to what shares in the hands of the same holders are liable to any, and, if any, to what contribution, and this will of course affect the shares which were mortgaged to the plaintiff's testator. Nothing has been paid or distributed in the way of profits since the date of the mortgage; the bill is brought for foreclosure of the five shares mortgaged; and the only question is the form of account which I ought to direct, and the declaration, if any, which I ought to make for the purpose of taking such account.

The history of the colliery is this: every year the price of the coals sold exceeded the cash expended for winning them, and in that sense it is said that the colliery always made profits; but on the other hand it became necessary every year to make expensive works for the purpose of maintaining and working the colliery, the expense of which not only absorbed all the profits, but required considerable additional outlay, the money for which was produced by calls on the shareholders in proportion to the shares which they held. The result has been, that,

though no profits have been divided for many years, the debts owed by the concern and attaching to the shares are diminished, and the collieries themselves are extended, and the value of them is improved. I do not think that the law on this subject is open to much question, but the facts are in dispute, and it would not only be useless, but produce some injury, and therefore be worse than useless, if I were to make declarations as to the particular mode of taking accounts upon a supposed state of facts, which is neither proved nor admitted. The law, which I think is clear, is this: that the plaintiff is entitled to payment of what is due to her upon her mortgage, or in default of such payment to foreclosure of the shares mortgaged. In taking this account she is not, in my opinion, entitled to ask for any account of profits paid or distributed before she filed her bill, nor is she entitled to contest any call upon the shareholders, or to require them to account for their previous management of the colliery; and in ascertaining what the plaintiff's shares are, which may either become hers by foreclosure, or may, by arrangement, be sold, she is entitled to say that no extra burden should be thrown upon her shares, or upon any class of shares to which her shares belong, which is not so thrown in accordance with some contract or agreement in force at the time when the shares were mortgaged to Redmayne. The plaintiff says that this has been done, the defendants deny it, and I can not make any declaration on a speculative suggestion of facts. I have stated generally the view which I take of the matter, and the mode in which I shall take the account. I think I ought to make a decree to the following effect, which I believe will enable the court to do justice. Upon further consideration between the parties, in the first place, I shall direct an account of what is due to the plaintiff for principal, interest and costs, and then I shall make the usual foreclosure decree against Matthew Forster; I intend also to give the other shareholders leave, if Forster does not pay the amount due, to take the shares by paying the amount due, by which I do not mean to give successive decrees of foreclosure and redemption, as is the case where there are subsequent mortgagees, but if Forster does not pay upon the particular day appointed, I mean to direct that the other shareholders may, upon a day named, say a

month from that time, jointly or severally take the shares if they please, and if not, then the shares are foreclosed. Then if the plaintiff is paid she has nothing more to do with the concern; but if she is not paid, then I think she is entitled, for she then becomes a partner, to take an account of what are the debts and liabilities which the partnership is now liable to pay, and to ascertain what proportion of such debts and liabilities, as between the plaintiff and the other partners, is properly attributable to the five shares mortgaged by Rawsthorne to Redmayne. I shall reserve further consideration and the subsequent costs of the suit. If the plaintiff is paid, no question will arise; if not, then I shall take this account, and on further consideration I shall deal with it as I think fit.

It is to be observed that, in my opinion, the other defendants are all necessary parties to this suit, because it is in substance one in which each partner is at liberty to buy the shares if the others do not. And he is entitled to see that the account, which fixes the amount upon payment of which he may take them, is properly taken, and also because, if the plaintiff is not paid, she thereupon becomes a partner in the mine, and entitled to see that the accounts are properly taken, so that if she thinks fit to sell her shares she may be able to tell the purchaser what it is that she has to sell.

Therefore, the plaintiff is entitled, in default of redemption or purchase by the other partners, to an account of all the proceeds of the colliery, and also to know what of the debts and liabilities attaching to the concern at this time are properly attributable to her shares. That is the substance of the decree which I propose to make.

ROBERTS' AND PYNE'S APPEAL.

(60 Pennsylvania State, 400. Supreme Court, 1869.)

Chattel mortgage by corporation against public policy. The act of January 11, 1867, allowing mining corporations to mortgage their "property," does not allow them to execute a chattel mortgage of their personalty, such incumbrances being opposed to the policy adopted by the commonwealth upon the incumbrance of personal property.

Appeal from the decree of the Court of Common Pleas of Schuylkill County.

The decree in this case was made in the distribution of the proceeds of the sheriff's sale of the personal property of the New York & Schuylkill Coal Company, under a number of writs of *feri facias*.

The defendants in the executions are a corporation created under the laws of Pennsylvania, having a right to hold coal lands and possessing mining privileges. The act of January 11, 1867, provides, "That all iron and other manufacturing and mining corporations, incorporated under the laws of this commonwealth, shall be and hereby are enabled to borrow moneys and secure the loan to be made to them by mortgage of their property, and to dispose of their bonds or certificates of loan or pay interest thereon, at such rates as railroad and canal companies may now do."

Under the authority of this act the New York & Schuylkill Company, on the 1st of April, 1867, made a mortgage to Marshall O. Roberts and Perry R. Pyne, who are the appellants in this case, as trustees, to secure 350 bonds of different denominations to the aggregate amount of \$250,000, the company needing and having resolved to borrow that amount of money to carry out the objects of their incorporation; the mortgage to be for the benefit of all persons or bodies corporate who should become the holders of their bonds.

The mortgage was of all their real estate generally and also included all the personalty of the corporation.

Barnhart & Koch, and other creditors, obtained judgments against the company and levied on a large amount of store goods in their store houses at Forestville and Thomaston, and lumber, timber, iron, machinery, etc., at their mines.

The proceeds of the executions, all having come from sales of personal property, amounting to \$30,256.89, were paid into court. The fund was referred to G. E. Farquhar, Esq., as auditor, for distribution. The claimants on the fund were for labor, for timber furnished, for mining purposes, the execution creditors, etc. The trustees under the mortgage claimed to take the whole fund, alleging that all the defendant's personal property was bound by the mortgage. The auditor decid-

ed that the act of assembly of January 11, 1867, did not authorize a mortgage to create a lien on personal property, and that the trustees consequently had no claim on the fund. He distributed it, therefore, amongst other creditors.

The trustees excepted to the report of the auditor; the exceptions were overruled by the court of common pleas and the report confirmed. The trustees appealed from the decree of confirmation and assigned for error that the court did not award to them the whole fund.

F. W. HUGHES, for appellants.

J. W. RYAN and B. W. CUMMINGS, for the appellees.

The opinion of the court was delivered February 4, 1869, by AGNEW, J.

The act of 11th January, 1867, entitled: "An act to enable Manufacturing and Mining Corporations to borrow money," consists of a single section, and provides, "That all iron and other manufacturing and mining corporations, incorporated under the laws of this commonwealth, shall be and are hereby enabled to borrow moneys, and to secure the loans to be made to them by mortgage of their property, and to dispose of their bonds or certificates of loan, or pay interest thereon, at such rates as railroad and canal companies may now do." The question presented is, whether this act intended to embrace a mortgage of *chattels* in the term property, or only such property as had been usually mortgaged before the time of its passage. It is said the act is an enabling act. This is so, but was its purpose to enable these companies to mortgage their *personal* property, or was it to enable them to *dispose* of their bonds or pay *interest* thereon, *at such rates* as railroad and canal companies can now do? If the former purpose had been distinctly in the mind of the penman of the act, it is strange he did not say so in clear and apt language, considering it to be the introduction of a novelty into the laws of mortgage, unwarranted by any former policy of the State. It is true railroad companies have been authorized to do this, and other corporations in similar circumstances, whose per-

sonal interests have been of such a permanent and fixed character, or so incapable of removal, that no inconvenience would be felt in relaxing the general rule as to movables. But in this act the term property is so wholly unexplained by its context that it may or may not refer to chattels, and it leaves the mind to hesitate and doubt whether the legislature meant more than the property accustomed to be mortgaged under the laws of the State, and for which provision was made for notice by recording, and remedy by *scire facias*. But the intent to facilitate the borrowing of money at unusual rates of interest, is clearly expressed, the power being to dispose of their bonds, or to pay interest thereon at such rates as railroad and canal companies may now do. Having then one clear and useful purpose plainly in view to satisfy the language of the act, and another which is extremely doubtful, we must look to the reason bearing upon the interpretation to determine what meaning shall be given to the word property. If we give the term its full scope, it will embrace, as the sheriff's levy actually did, an infinite variety of goods in a store, kept purposely for sale to laborers at the mines, and to the country side, and thus we should have the lien of the mortgage sailing out after every spool of cotton, paper of pins, hat or cap, and the notions on twenty-two shelves stated in the sheriff's levy. But if the absurdity of such a roaming lien should compel us to contract the meaning of the word, at what boundary shall we stop? What warrant have we to say it shall only embrace houses, mules, and the tools and implements of labor in the mines? And if we should say the sheriff will not be sent in the foolish pursuit of property or merchandise taken or sold off the premises, of what use would be the power to mortgage the personalty? Chattel mortgages and sales which leave the property in possession of the debtor, are against policy and void against execution creditors. Then what evidence have we in the act itself that it was the intention of the legislature to uproot this ancient and wise policy? Certainly none but the use of a word of wide meaning, and which might have been readily used in reference to a kind of property in the mind of the penman, which was the common subject of mortgages. On the other hand, the omissions of the act tell strongly against the wide meaning asked for it. There is no provision

for recording such a mortgage, or for a remedy upon it. It is not a good argument to say the recording of the mortgage as to the realty would carry the personalty with it. That, however, supposes that every mortgage will consist of realty as well as of personalty. But if property means chattels, it would be as competent to mortgage personalty only as both realty and personalty. Certainly the legislature did not mean that an unrecorded chattel mortgage should be kept in the pocket of one creditor to be sprung upon others when it might suit his interests to let it go. Upon a view of the whole case we do not think it was meant by the term property to cover any other kinds than those which the law made capable of being mortgaged by such corporations.

Judgment affirmed.

RENTON V. MARYOTT ET AL.

(21 New Jersey Equity, 123. Court of Chancery, 1870.)

¹**Burden of proof in case of fraud—Debt for valueless stocks.** In a suit to foreclose a \$6,000 mortgage it appeared that \$1,000 of the debt was for mining stocks, which the defendant claimed were worthless, and which he testified, the plaintiff agreed to take back at \$1,000. The plaintiff and another witness testified that the plaintiff's only representation as to the stock was that he had paid \$1,000 for it. *Held*, that the burden of proof to show fraud or misrepresentation was upon defendant, and having failed to show it, he could not have the \$1,000 deducted from the mortgage.

Caveat emptor applied to sale of stocks. The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud.

J. W. TAYLOR, for complainant.

C. E. SCOFIELD, for defendant.

ZABRISKIE, Chancellor.

The defendant, Maryott, in February, 1867, applied to the complainant to borrow \$6,000 on the note of one Jacobs

¹ *Law v. Grant*, 7 M. R. 56.

to him. The complainant agreed to take the note and advance \$5,000 in cash, and transfer six hundred and twenty-five shares of a mining company, if Maryott would take them for \$1,000, the price which he stated that he had paid for them. He required Maryott to indorse the note, and to give a mortgage as security for its payment. The note was indorsed by Maryott and one Edwin Ross, and a mortgage given to secure the payment of it. This is one of the mortgages sought to be foreclosed in this suit. Maryott alleges that Renton represented to him that this mining stock was worth \$1,284, and that he, Renton, would take it back at \$1,000, and that it is worthless; and asks that the amount of \$1,000, for which it was taken, should be deducted from the mortgage.

Renton denies that he made any statement as to the value of the stock, but only said that he paid \$1,000 for it, which he testifies was the fact, and denies that he ever agreed to take it back. Edwin Ross, who was present at the agreement and its consummation, confirms Renton, and says that he made no representation of its value, and no agreement to take it back.

The burden of proof to show fraud or misrepresentation is upon the defendant. He alone testifies to the representations; he is contradicted by Renton and Ross, and is not supported by any circumstances. That the stock was of little or no value, can not affect the validity of the mortgage, or create an equity, to have a deduction from the amount for which it was given. The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. Here, although the stock was worthless, there is no sufficient proof of any representation of its value, or any act that would amount to fraud, either at law or in equity. The complainant is entitled to the full amount secured by the first mortgage, with interest; and on the second mortgage for \$9,000 to the amount actually advanced with interest.

GARTSIDE ET AL. V. OUTLEY ET AL.

(58 Illinois, 210; 11 Amer. R. 59. Supreme Court, 1871.)

Entry for condition broken—¹ Effect upon intervening lease. It is in the power of the mortgagee, on entry for condition broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant.

Acceptance of rent creates tenancy. The receipt of rents by the mortgagee upon entry will create the relation of landlord and tenant, but only a tenancy from year to year. Such receipt of rents will not make valid the lease for the unexpired term, as against the mortgagee.

Attacking decree and sale collaterally. The regularity of a decree and sale of mortgaged premises can not be attacked in a collateral proceeding; it must be done by a direct proceeding instituted for the purpose.

Contract construed as a lease. A grant of lands to mine for coal "so long as there is coal to mine thereon" with leave to take, under certain conditions, all the coal in the lands, and also containing mutual covenants, and a provision of forfeiture in case of non-compliance, construed to be a lease.

Appeal from the Circuit Court of St. Clair County; the Hon. JOSEPH GILLESPIE, Judge, pres¹.

The reason urged by appellees' counsel, why the sale under the decree of the Circuit Court of the United States was void as to persons not parties to the suit, was, that the sale was at a different time and upon different notices from that provided for in the deed of trust. All other facts necessary to an understanding of the decision are stated in the opinion.

WILEY & PARKER and W. H. UNDERWOOD, for the appellants.

GUSTAVUS KOERNER, for the appellees.

SCOTT, J., delivered the opinion of the court.

This is an action of ejectment, brought by the appellees to recover the possession of certain coal lands described in the declaration. They claim to be assignees of John A. Twiss, and

¹ *Capron v. Strout*, 9 M. R. 391; *McDermott v. Burke*, 16 Cal. 580.

seek to obtain possession under a lease formerly executed to him by the railroad company.

On the 9th day of May, 1856, the Bellville & Illinoistown Railroad Company executed to Twiss a lease, or grant, of the lands in controversy, for an indefinite period, with leave and permission to take, under certain conditions specified in the grant, all the coal contained in said lands. The lease contained mutual covenants, and also a provision of forfeiture in case of non-compliance on the part of the lessee.

In March, 1853, the Bellville & Illinoistown Railroad Company executed to Marshall O. Roberts and others, a deed of trust upon all the property of the company, including the lands leased to Twiss, to secure the payment of the first mortgage bonds issued by the company.

In May, 1855, the railroad company executed to John Wilkinson another deed of trust on the same property, to secure the second mortgage bonds issued by the company.

These several conveyances were placed on record in the proper office, and whatever interest the lessee or his assignees acquired under the lease and the several assignments, were taken with notice of the prior rights of the mortgagees.

In October, 1856, the Bellville & Illinoistown Railroad company, and the Terre Haute, Alton & St. Louis Railroad company, were consolidated under the name of the latter company, the consolidated company succeeding to all the property and franchises, and assuming all the obligations of the former companies.

At a subsequent period, the consolidated company having failed to pay the interest as it became due on the bonds secured by the deeds of trust of 1853 and 1855, the road, together with all the property of the company, was surrendered to William D. Griswold for the benefit of the trustees. The surrender took place in the early part of 1860, and from that time on Griswold continued to operate the road for the benefit of the trustees, until 1862, when the deeds of trust were foreclosed in the United States court for the Southern District of Illinois, and a sale of the mortgaged property was had in pursuance of the decree of that court. Subsequently the purchasers at that sale were, by a special act of the legislature, incorporated under the name of the St. Louis, Alton

& Terre Haute Railroad Company, which company now holds the fee simple title to the mines in controversy.

It will be borne in mind that at the date the present owners of the land became the purchasers at the sale under the decree of the Circuit Court of the United States, neither Twiss nor any of his assignees were in possession of the premises. The lease and the several assignments, however, were of record in the proper office, and to that extent, but no further, they had notice of the rights of the lessee and of the assignees, whatever they might be. Previous to that sale, the lease had been declared forfeited by Griswold, acting in behalf of the trustees, either lawfully or unlawfully, and possession had been taken, and a new tenant of the company placed in charge.

It is a controverted fact in the case, whether the lease had been rightfully declared forfeited for non-compliance with its terms by the lessee or the assignees, prior to the surrender in February, 1860. The right of Twiss to make the surrender is also questioned, and it is insisted that it was made for a fraudulent purpose, and through the corrupt use of money.

We are not inclined to attach much importance to these controverted facts, and for that reason we shall not inquire whether the lease was in fact forfeited for non-compliance, or whether Twiss had any lawful authority to make a surrender of the mines, or what motives may have influenced his mind in that regard.

In the view that we have taken of the case, there is one question that is conclusive of the rights of the appellees under the lease. The lease granted to Twiss was for no definite period, but was to run so long as there was coal to mine. The only limit to its duration was in the clause which provided for a forfeiture in case of non-compliance with its terms, if we except the further fact that it would expire by its own limitation when the coal was exhausted.

It may be assumed as an admitted fact that Griswold, after he took possession of the property of the company, in behalf of the trustees under the mortgage, did receive bank rents of the lessee in possession. It is not doubted that the lease, being subsequent to the mortgage, could have no force as against the rights of the mortgagees.

It is insisted, however, that inasmuch as Griswold, acting in

behalf of the trustees, after entry for non-payment of the mortgage indebtedness, did receive bank rents of the lessee in possession, that fact would set up the lease as against the mortgagees, and those claiming under them, for the entire period which the lease had to run. This is the controlling question in the case.

It is in the power of the mortgagee on entry for condition broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice; or the mortgagee may elect to recognize the lessee as his tenant. The authorities all agree in holding, where the mortgagee has entered for condition broken, and received rents of the tenant, that the relation of landlord and tenant will be created between the parties. The single act of demanding rent has been held not to be sufficient for that purpose. There must be some distinct act on the part of the mortgagee that manifests the intention to recognize the lessee as his tenant, the question of the time for which it will be considered that the tenancy is created, by the fact that the mortgagee received rents of the lessee; whether for the entire period of the unexpired lease, or for only a shorter period, is a question of more difficulty of solution. The generally received doctrine seems to be, that the receipt of rents by the mortgagee will only create a tenancy from year to year, in analogy to the rule where the tenant holds over after the expiration of the lease. The doctrine proceeds upon the ground that the lease is inoperative as to the mortgagee, and is terminated by the act of entry. The rule of the common law is well established, that the mortgagor can not, without the consent of the mortgagee, execute a lease that will prevail against the rights of the mortgagee, and it has been uniformly held that the entry of the mortgagee puts an end to the lease: *Keech v. Hall*, 1 Doug. 2.

Upon principle, therefore, something more is required than the mere receipt of rents from the lessee, to make valid the lease for the unexpired term, as against the mortgagee. In *Doe v. Bucknell*, 8 Carr. & Payne, 566, Patterson, J., held, that if the mortgagee, instead of turning out the lessee, elects to take him as his tenant, the mortgagee does not thereby set up the tenancy for the entire unexpired term of the lease, but only from year to year.

The case of *Thunder v. Belcher*, 3 East, 449, holds the same doctrine, that the receipt of rents will only create a tenancy from year to year, as between the lessee and the mortgagee. We find that these cases have been quoted by numerous text writers, and the doctrine established does not seem to be questioned: Hilliard on Mortgages, p. 235, § 231; Taylor on Landlord and Tenant, § 120; Platt on Leases, p. 171.

We have been referred to no English or American case that holds the doctrine insisted upon by the counsel for the appellees, that the mere receipt of rents from the lessee, by the mortgagee, after entry for condition broken, will set up the ease for the unexpired term. We do not see how such a doctrine can be supported on principle. It is more in harmony with the analogies of our law, to hold that it will require a special agreement to make valid and to effectuate the extension of a lease executed by the mortgagor.

We can conceive that a case can arise where the mortgagee might be estopped by his acts from contesting the rights of the lessee under the lease. If, for instance, the mortgagee should continue to receive the rents for any considerable period, and in the meantime suffer the tenant to make extensive and permanent improvements under the terms of the lease, he will be held to have consented to the extension of the lease. Under such circumstances, to permit the mortgagee to retract his consent would be to practice a fraud on the lessee, and the doctrine of estoppel *in pais* would justly apply. In case the mortgagee should acquiesce in the making of improvements by the lessee, and the expenditure of money, whereby the value of the estate would be greatly increased, it would be inequitable to permit him to retract and contest the lease, or the rights of the lessee under it.

It does not appear, in this case, that any improvements of a permanent character were made on the premises by the lessee or the assignees, after the payment of bank rents to the mortgagees in possession. Indeed, the evidence shows that there were no improvements of any considerable value made, subsequent to the payment of rents. The doctrine of estoppel *in pais*, insisted upon by the counsel for the appellees, can have no application to the facts of the case.

It is very doubtful, in any view that can be taken, whether the appellees can assert any rights as against the present owners of the premises in controversy. Neither the lessee nor any of the assignees were in possession of the premises at the date of their purchase under the decree of the United States Court. It is true that the lease and the several assignments were upon record in the proper office, but there was no one in possession claiming any rights under the lease. The lessee himself surrendered the possession of the premises, and the assignees acquiesced in the possession of the mortgages for a period of two years prior to the sale, and it is not until after the expiration of five years, and after the present owners had made permanent and valuable improvements, that they attempt to assert their rights under the lease in this action. It is not pretended that the present owners ever received any bank rents, or that they, in any manner, ever recognized any rights in the lessee or assignees under the lease or the several assignments. We are at a loss to see upon what principle the appellees can assert any rights under the lease as against the present owners and their tenants.

It is insisted that the decree and sale under which the present owners claim, are irregular and void. The sale can not be thus attacked in a collateral proceeding. If the appellees would avail of error, if any exists, in the foreclosure of the mortgages or deeds of trust, or the sale thereunder, it must be in some direct proceeding instituted for that purpose.

It is insisted that the instrument entered into by the parties is not a lease; that it conveys a higher estate. The counsel does not define the nature of the estate which he insists is created, except to indicate that the grant is in the nature of a "servitude," to which the company's land was subjected for an indefinite period. We think the fair construction to be given to that instrument is, that it is in the nature of a lease, and creates only the relation of lessor and lessee. If, however, it can be said that it conveys the fee in the land, with a perpetual reservation of rent, we do not see how that view could aid the claim of the appellees. It would appear to us that if such an estate passed, the foreclosure of mortgages, and the sale thereunder, would terminate absolutely and forever, all rights of the grantee and his assignees.

In the event that such a construction could be given to the instrument, a very grave question would arise, whether the trustee in possession, by any act of his, could incumber the estate to the prejudice of the *cestui que trust*. This question has not been argued by counsel, but upon first impression we should be inclined to hold that he could not.

In no view that we have been able to take of the case, can the appellees recover against the present owners of the land and their tenants, and if another trial shall be had on substantially the same evidence, it will be the duty of the court to instruct the jury to find for the appellants: *Storing v. Onley*, 44 Ill. 123.

This view of the law renders it unnecessary to discuss the other questions raised by the counsel on the record.

It was error in the court not to award a new trial and the judgment must be reversed and the cause remanded.

Judgment reversed.

WALKER V. TIFFIN GOLD AND SILVER MINING CO.

(2 Colorado, 89. Supreme Court, 1873.)

Pleading after rule day. If a rule to plead expires in term time, a pleading may be interposed at any time before application for default.

Idem—It is otherwise when the rule expires in vacation. In that case the defendant must plead within the time specified, and a demurrer filed after the rule day may be stricken from the files, and the bill taken as confessed.

¹**Deed and title bond construed as mortgage.** Tubbs conveyed to Walker his interest in certain mining property, and the next day Walker executed a title bond to Tubbs, binding himself to re-convey after he took from the mine the amount of a certain note. *Held*, that the deed and bond together amounted to a mortgage, and that Walker as mortgagee in possession was bound to re-convey as soon as his debt was satisfied.

Decree should not extend beyond the case made in the bill. Upon bill to set aside a deed, or procure a release of mortgage, if there is nothing in the case to show that the defendant has no other interest in the property than that which he acquired by such deed or mortgage, it is error to decree an absolute release which may operate against another estate acquired by the defendant; and where it is not shown by the bill that

¹ *Halsey v. Martin*, 10 M. R. 549; *Blackwell v. Oerby*, 10 M. R. 531; *McLaughlin v. Shepherd*, 32 Me. 143; 52 Am. Dec. 646.

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complainant is entitled to the possession of property, it is error to award such possession.

Error to District Court, Summit County.

The bill was filed by defendant in error against plaintiff in error to set aside a deed made by one L. G. Tubbs to plaintiff in error conveying certain property in Summit county, and also procure a release of a certain mortgage executed by L. G. Tubbs, John Shock and Adam L. Shock, to plaintiff in error upon the same premises. The bill charged that on the 5th of November, 1869, complainant acquired title to certain mining property from Ziba Surles, John, Adam L. and Daniel Shock. That on the 12th of October, 1864, John and Adam L. Shock received from L. G. Tubbs a bond for a deed to a portion of the same property. That John and Adam L. Shock performed the condition of said bond, and thereupon Tubbs conveyed to them the property therein described. That on the 16th of October, 1865, Tubbs, Adam L. and John Shock mortgaged a portion of the same property to Silas M. Walker, the defendant, to secure the payment of \$1,500, then due by promissory note, but there was no time fixed for payment of the same. The bill also charged that defendant Walker, knowing the property to be of great value, fraudulently intending to get possession of the property, gave to Tubbs his bond dated May 1, 1867, conditioned to work the property and indorse the net proceeds thereof upon the note described in the mortgage. That defendant Walker, on the 30th of April, 1867, in fraud of the rights of Adam L. and John Shock, and with full knowledge of the existence of the bond from L. G. Tubbs to them, procured from Tubbs a quitclaim deed for the same property. The bill further charged that Walker had worked the property for nearly three years and had obtained therefrom the sum of \$12,000, for which he had never accounted to any one.

The special prayer of the bill was as follows: "And the said complainant prays that this honorable court will, by a decree thereof, cancel and declare null and void the deed given by the said L. G. Tubbs to the said Silas M. Walker, defendant, and marked herein as Exhibit 'I,' and by its decree cancel and release the incumbrance created on the

said property in said bond, marked Exhibit 'B' aforesaid, and included in the deed marked Exhibit 'A' aforesaid, and that by further decree of this honorable court, the complainant may be put in the peaceable possession of all and singular the property described in said bond, marked Exhibit 'B' aforesaid, and now claimed and possessed by the said defendant."

Annexed to the bill as exhibits were the several conveyances and instruments referred to in the bill.

At the August term, A. D. 1870, an order was entered requiring the defendant to plead, answer or demur to the bill by the 1st of July, 1871. A demurrer was filed by defendant on the 14th of August, 1871, which the court, upon motion, struck from the files and ordered that the bill be taken as confessed. A decree was entered, in which the deed from Tubbs to Walker was declared to be fraudulent and void, and the defendant was required to deliver the same up to be canceled, and within ten days execute to the complainant "a deed of release of the said ditch and mining property in the said deed from the said Tubbs to the said defendant described," and, upon default thereof, a commissioner was appointed to make the conveyance; the court also required the note and mortgage to be delivered up to be canceled, and awarded the possession of the premises described to the complainant.

C. S. EYSTER and MILLER & MARKHAM, for plaintiff in error.

M. BENEDICT, for defendant in error.

WELLS, J.

1. It is argued that the demurrer put in by the plaintiff in error in the court below, though interposed subsequent to the expiration of the rule given at the previous term, was nevertheless in apt time, having been filed before any further steps taken in the cause, and this position seems to be warranted by the cases cited by counsel: *Castle v. Judson*, 17 Ill. 381; *Cook v. Forest*, 18 Id. 582;

Bingham v. Meries, 7 Cr. 99. The case of *Dunn v. Keegin*, 3 Scam. 295, seems to countenance the same doctrine.

We agree that where the rule expires in term time and the pleading be interposed before application for default, it may well be considered as filed in apt time, even though after the lapse of the day named in the rule; for in such case the opposite party, omitting to take advantage of his adversary's default, on the first day thereof, may be said to impliedly stipulate that the pleading may still be interposed; that is to say, that the rule shall be so extended to include that day. This is the fair inference from his silence. And this implied stipulation may be said to be renewed with each hour and moment which lapses, so that, if interposed at any time before default prayed, the pleading is in time. This I conceive to be the only reasoning upon which the usage obtaining in the courts in this respect can be supported, for unless a supposed stipulation of parties interposes to excuse the delay, it is in effect to say that the orders of the court in this respect are of no binding force. But it is clear that no such stipulation can be implied to excuse a failure to comply with a rule expiring in vacation, for, in such case, the party to be answered has no opportunity to take advantage of the default until the term sits, his silence in the meantime being enforced can not give rise to any inference of acquiescence. And not only is the rule, when applied in the last case, unwarranted by the reasoning which supports it in the former, but it is manifestly against good policy that it should be applied in those cases where the time limited expires in vacation. If, when required to plead or answer at an early day in the vacation, the defendant may defer his pleading until the day before the term convenes, it will lead to indefinite delays. In the present case the bill is of a nature to require the careful consideration of counsel in order to the preparation of the defense thereto, and the determination of the question whether the defendant should answer in the first instance; or except, plead or demur. It was eminently proper, therefore, the first term being of short duration, that a day in vacation should be fixed for the coming in of answer, and the day which was fixed, being forty-five days before the second

term should convene, was a reasonable one ; it afforded to counsel for the defendant ample time to determine the preliminary questions and interpose his defense understandingly ; it also afforded to the complainant's counsel time to consider the defendant's demurrer if one should be put in and to prepare to resist it, or to prepare amendments to the bill to be interposed as soon as leave should be obtained for that purpose, if the demurrer should appear to be well taken ; or if an answer had been interposed, replication might have been put in and the testimony prepared in order to final hearing at the second term. The rule contemplated these mutual advantages and opportunities, and was framed in the interest of both parties. But by his disobedience and by demurring at the end of the vacation the defendant sought to engross all the advantages to himself. His course compelled the plaintiff either to submit to a further delay or else to proceed to the consideration of the demurrer or the preparation of amendments precipitately, and without that deliberation which, in all difficult and important litigation, appears to be necessary to avoid error. To say that the court was bound to accept the demurrer at so late a day, is to prescribe a rule which will open the door to delays against which the courts will be powerless to afford relief, except by restricting all rules to plead or answer to a day in the term which, in many instances, would do injustice to defendants. Upon the same reasoning which was applied in *Castle v. Judson*, it might be held that the plaintiff's omission to declare ten days before the term as required by the eighth section of the Practice Act, shall not subject him to the penalty of continuance which is there prescribed, provided the declaration be filed at any time before the defendant moves for the continuance.

The section here referred to is only a statutory rule to declare, and is of no more binding force than a like rule of court. Yet this construction of the statute was never indulged, nor, so far as I know, ever contended for. Whatever may be the weight of authority elsewhere, we conceive that a just distinction may be taken between rules to plead expiring in term time, and those which expire in vacation. In the latter case, we think a strict observance of the rule

ought to be enforced. Clearly, for cause shown, the court may, in its discretion, excuse the default, and permit the party to interpose his pleading after the lapse of the day named in the rule; but unless some matter of excuse be shown, a pleading filed after the day limited ought not to be regarded, where, as in this case, the plaintiff, at the earliest opportunity, applies to have the pleading taken from the files.

2. It is argued that by the conveyance of April 30, 1867, the defendant obtained the title which Tubbs, before that, had; and that the obligees in the bond of October 12, 1864, if they desired to perform the conditions thereby imposed upon them, should have applied to the defendant. The payment of the purchase money to, and the conveyance by, Tubbs, it is said, work nothing; for Tubbs had then nothing to convey; therefore, it is said, there was error in requiring the defendant to release to the complainant. But this argument omits from view the bond to reconvey, which was executed by Walker to Tubbs on the 1st day of May, A. D. 1867. This obligation gives to the former conveyance the effect of a mere mortgage; it is as if the condition of the bond had been written in the deed. If the obligation to convey had been conditioned upon payment at the day or the like, then, in order to entitle the obligee to have performance of the bond upon payment at a later day, it might, perhaps, be required of him to show that in fact the conveyance was made in contemplation of the subsequent execution of a bond to reconvey, and that in truth both instruments were one transaction. But here the condition of the bond is to reconvey on payment, without limitation as to time, and it appears to us that upon their face these two instruments, the conveyance of April 30th and the bond of May 1st, have the effect of a mortgage merely.

So far as the effect of the conveyance by Tubbs is concerned therefore, Walker was never anything more than a mortgagee in possession. Whenever his debt was satisfied, by the yield of the mine or otherwise, he was bound to reconvey; and the obligee, Tubbs, having, by the conveyance of October 11, 1869, transferred his equity to the Shocks, the complainants, by their conveyance of November 5, 1869, suc-

ceeded to all the rights which Tubbs had, and the defendant, on the satisfaction of his debt, was bound to convey to the complainant, whether the Shocks had performed the condition of the bond or not. So far as this argument is concerned, therefore, there was no error in the decree.

But it is to be observed that the decree requires the defendant to release to the complainant the premises "in the deed from the said Tubbs to the said defendant described." This imports that the defendant shall release all present interest. It is nowhere alleged that Tubbs held paramount or perfect title, or even had any estate whatsoever in the premises; it does not affirmatively appear that the plaintiff in error received the possession from him; nor does the acceptance of a bare release, such as the conveyance of April 30, 1867, was, estop plaintiff in error from questioning the title of the releasor. For anything that can be known, then, the plaintiff in error may, since the conveyance from Tubbs, have acquired a superior title from another source. The effect of the release, which by the decree the defendant is required to make, would be to pass out of plaintiff this superior title. In this, therefore, there was error.

3. The decree of the district court directs that the defendant, on demand, surrender to the complainant possession of the premises therein described to the complainant. The allegation of the bill is, that on, etc., the complainant acquired a title to certain property known as, etc., situated, etc., by virtue of a certain deed duly executed according to law, and delivered to said complainants by, etc. For a more particular description of the property, reference is made to a copy of the deed attached. Now, if we look to this allegation of the bill alone, it is altogether uncertain whether the complainant is entitled to what was decreed or not. For the word "title" imports not an estate, or the interest which one hath in lands, but "the means whereby the owner hath the just possession of his property." 2 Bl. Com. 195. And this title, it is said, may be, 1st, a bare possession merely; or, 2d, the right of possession; or, 3d, the right of property without either possession or a right of possession; or, 4th, the right of property united with an actual and lawful seizin. By this allegation of the bill, therefore, if we look alone to this, while it appears to me that it can

not be said that the plaintiff holds otherwise than in severalty, it is utterly uncertain whether it is entitled to the present possession or not. It is entirely consistent with this allegation that another has an estate for life or for years, not yet determined. Neither do I discover any other allegation in the bill which supplements this. It is nowhere alleged that any of those from whom the complainant deduces title had any present estate at the time of these several conveyances, or ever had possession in fact, nor that the complainant is, or ever was, entitled to possession. And if we may look to what is contained in the exhibits to explain the obscurity of these allegations (the propriety of which is not altogether clear), nothing appears to aid us, for none of the conveyances exhibited assume to pass a present interest, but only all the right, title and interest of the grantor, which may have been either present or reversionary.

Again, if we look to the exhibits to aid the bill, it would seem that we must give effect to everything which appears here, whether favorable to the plaintiff or otherwise; and by the exhibits it appears affirmatively that in a large part of the estate in controversy the complainant has but an undivided moiety; while the decree is susceptible of a construction which requires that the complainant be admitted to the full and absolute possession of the whole estate.

So far as the decree directs an absolute release by the defendant, Walker, and a surrender of his possession to the complainant, the decree is beyond the allegation of the bill, and must be reversed; and if the decree of this court shall go no further than this, all questions presented by the present record will have been completely resolved. Inasmuch, however, as to pause here will leave the controversy between these parties still undetermined, and will require the complainant to renew the litigation in another form, we shall reverse the decree in all things, and remand the cause with direction to the district court to allow the complainant to file an amended bill.

Reversed.

SHARPE V. ARNOTT ET AL.

(51 California, 188. Supreme Court, 1875.)

Finding not disturbed. A finding that a bill of sale was intended as a mortgage will not be disturbed on appeal when the evidence is conflicting.

Peculiar instrument construed as mortgage. A., who was indebted to both G. and S., conveyed an interest in a mining claim to G., by bill of sale, in which it was stipulated that G. should pay the debt to S. "as fast as it comes out of the claim, after deducting three dollars a day for living, for each day's work." *Held*, that the instrument was intended as a mortgage, and a decree was directed enforcing the lien of S. although G. had not realized three dollars per day from the claim.

Appeal from the District Court, Tenth Judicial District, County of Sierra.

On the 7th day of August, 1869, James Arnott was indebted to defendant Griffin in the sum of eleven hundred and sixty dollars, and to the plaintiff in the sum of seven hundred and ninety-two dollars, and executed to defendant Griffin the following bill of sale:

"KNOW ALL MEN BY THESE PRESENTS, that James Arnott, resident of Brandy City, Lincoln Township, County of Sierra, State of California, party of the first part to these presents, does hereby cede, sell and deliver, and by these presents does convey unto Michael Griffin, of Brandy City, township, county and State aforesaid, party of the second part, all my right, title and interest in and to a certain mining claim, situate on Grizzly Hill, in the county and State before named; said right and title being one undivided one-fifth interest in the claims known and designated as A. Sharpe and Company's Claims, for the sum of eleven hundred and sixty dollars to me in hand paid, and for the further sum of seven hundred and ninety-two dollars, which my interest owes Thomas Sharpe, of said Co. which the party of the second part agrees to pay as fast as it comes out of the claim, after deducting three dollars a day for living for each day's work, together with one un-

divided one-fifth interest in all mining tools and appurtenances of whatever nature or kind.

"Witness my hand this 7th day of August, A. D. 1869.

"JAMES ARNOTT.

"Witness :

"WILLIAM BRUMWELL."

The plaintiff brought this action, and alleged in his complaint that the bill of sale was intended as a mortgage to secure both of said debts, and that his debt was first to be paid, and that he had a prior lien. The defendant Griffin alone answered, and denied that the bill of sale was intended as a mortgage, and also set up that if it was found to be a mortgage, that the plaintiff's debt was not to be paid until the amount thereof had been realized from the proceeds of the claim over and above three dollars per day, and that nothing had been realized from such proceeds. The court found that the bill of sale was intended to be a mortgage, and that the defendant Griffin had worked the claim, but had not realized three dollars a day from it, and enforced the lien of the mortgage as to the debt due to the plaintiff, and directed that the proceeds of sale, after satisfying Sharpe's debt and costs, should be paid into court for the person entitled thereto.

The defendant Griffin appealed.

BELCHER & BELCHER, for the appellant, argued that Sharpe was not entitled to anything except the surplus, after three dollars per day had been taken out of the claim.

P. VANCLIEF, for the respondent.

Griffin agreed that he would work the mortgaged interest and apply the proceeds, over wages and other expenses of working, to the payment of Arnott's debt to Sharpe. Of course, that debt was due. It was so admitted in the mortgage. No doubt Sharpe might have properly commenced his action to foreclose whilst Griffin was at work upon the claim; for there was no agreement that Sharpe should only be paid out of the proceeds of Griffin's work; nor that Griffin should continue to work until Sharpe should be thus paid, or for any specified length of time. Griffin was at liberty to quit work

after working three days, and either he or Sharpe, or both of them, might have foreclosed at any time.

BY THE COURT :

There is a substantial conflict in the evidence as to the fact whether the bill of sale was intended as a mortgage. The court below finds that it was so intended, and we can not disturb the finding. Assuming it to have been a mortgage, the provision by which the defendant "agrees to pay as fast as it comes out of the claim, after deducting three dollars a day for living, for each day's work," is not to be construed as an agreement that the debt to the plaintiff shall be paid only out of the proceeds as they came out of the claim, after deducting the three dollars per day. The defendant was not liable for the plaintiff's debt, and did not agree to pay it, except conditionally in the manner stated. He undertook, it is true, to apply the proceeds, after deducting the *per diem*, to the plaintiff's debt; but the debt was due when the instrument was executed, and there was no stipulation to extend the credit. There is no error in the record.

Judgment affirmed.

CARPENTER V. THE BLACK HAWK GOLD MINING
COMPANY ET AL.

(65 New York, 43. Commission of Appeals, 1875.)

¹**Power of corporation to mortgage its property.** Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money, or their debts. This power was abridged in New York by the Laws of 1848, and afterward modified by the laws of 1864, so as to permit a corporation to mortgage its real estate to secure the payment of its debts, but not merely to raise money to carry on its operations.

²**Disputing validity of mortgage—Estoppel.** The fact that bonds secured by a mortgage upon the corporate property were used both to pay debts and also to carry on the business of the corporation, does not render the

¹ *Mining Co. v. Anglo Cal. Bank*, 104 U. S. 192.

² *Rochester Bank v. Arerell*, 95 N. Y. 467.

mortgage invalid. The corporation and its stockholders having enjoyed the benefits of such bonds, would be estopped from repudiating either the bonds or the mortgage.

Mortgage not void because it includes franchises. A corporation has no power to mortgage its franchises. But a mortgage upon corporate property which includes both the real estate and the franchises of the company will be valid as to the real estate, and simply inoperative as to the franchises.

No particular form required to create mortgage. There is no rule of law which requires a mortgage upon real estate to be in any particular form, and an instrument in form resembling a trust deed is in this case held to be a mortgage.

¹ Mortgage of future real estate. A mortgage need not be confined to the present real estate of a corporation, but may include property to be afterward acquired.

Colorado real estate sold under power of sale in New York. It is no objection to a mortgage that it authorizes the sale of the mortgaged premises situate in Colorado, after certain specified notices in New York. The New York statutes relative to sales under power in mortgages do not apply to such a case; and in the absence of statute the parties have the power to agree upon the manner of sale to realize the security.

Validity of mortgage under New York statute. Under the New York statutes it is not necessary to the validity of a mortgage that it should be given to some particular creditor to secure his debt. All that the statute requires is that the mortgage should be given to secure the payment of debt. It might be by a mortgage directly to the creditors, or to trustees for their benefit, or by a mortgage to secure bonds issued and delivered to the creditors, or sold to raise money to pay them.

Appeal from judgment of the general term of the Supreme Court, in the second judicial department, reversing a judgment in favor of plaintiff, entered on the report of a referee and granting a new trial.

The action was brought to have a certain mortgage or deed of trust given by defendant, the Black Hawk Gold Mining Company, declared void, and for other relief.

In 1864 that company was organized as a corporation under the general manufacturing laws of this State, to work certain gold mines situate in Gilpin county, in the Territory of Colorado, and it acquired the title to several mines there and continued to work the same until May, 1866. It became indebted at that time in the sum of at least \$250,000, the whole amount of which was not, however, then known to the direct

¹ *Beall v. White*, 94 U. S. 332; *U. S. v. New Orleans R. R.*, 12 Wall. 362.

ors of the company. On the 8th day of May, 1866, at a meeting of the board of directors, the following resolution was adopted :

"Resolved, That the president and treasurer, under the direction of the executive committee, be authorized, upon receiving and filing the assent required by law of the stockholders owning two thirds of our capital stock, to cause coupon bonds to be duly issued, of \$1,000 each, secured by a first mortgage on the company's property, to the amount of two hundred and fifty thousand dollars, bearing interest at the rate of twelve per cent. per annum, and the principal payable in three years, for the purpose of meeting expenses in construction account and general indebtedness, the interest to be paid semi-annually, and to be free of United States tax, said bonds not to be sold below par."

On the tenth day of May, stockholders owning at least two thirds of the stock, in a paper reciting that resolution at length, gave their assent as follows: "We hereby assent to the due and proper execution of such first mortgage under the direction of the said executive committee for the purpose of securing the due payment of said bonds at maturity, and the interest thereon, according to the terms and tenor of said resolution." The said assent was duly filed on the 7th day of June, 1866, in the office of the clerk of Gilpin county, Colorado.

On the twenty-fourth day of May the board of directors passed the following resolution :

"Resolved, That the names of Beriah Wall and Benjamin White, of Providence, R. I., be and are hereby selected and directed by the board to be put into the proposed two hundred and fifty bonds to be issued by the company, pursuant to the resolution of the board of May 8, 1866, of one thousand dollars each, as trustees for the bondholders, and also in the proposed trust mortgage, as mortgagees to secure such bonds."

Subsequent to the filing of the assent aforesaid, the company executed and delivered to the defendants, White and Wall, as trustees, an instrument called a mortgage, which conveyed to them all the real estate, mines; mining property, personal property and franchises of the company, as well such property

as the company then owned as that which it might thereafter acquire, in trust for the security of the holders of the 250 bonds. The mortgage recited that the company was indebted to divers persons, which debts it was desirous "to pay and secure for money raised, and to be raised, for the general business and liabilities incurred in the management and improvement of the said property and the making, erecting and completing the works, etc., in and appertaining to the successful carrying on and conducting the mining operations of said company," and that it "deemed it proper and advantageous to raise and provide for as aforesaid, by loan, the funds now due and necessary for these objects." It also recited that the company had executed the 250 bonds, the form of which was inserted. It provided that, in case of default for six months in payment of either principal or interest, the trustees could take possession of the property and work the mines, applying the net proceeds *pro rata* on the bonds; and, upon like default, upon the written request of any of the bondholders, they were empowered to advertise and sell at auction the mortgaged premises, at the Merchants' Exchange or other public place in the city of New York, after three months public notice, once in each week in two of the daily papers printed and published in said city, and after serving a printed notice of such sale at least six weeks before the day of sale, personally or by mail, upon each of the trustees of the company. The bonds were made payable to the two trustees named, or bearer, in three years, in the city of New York, and some of them were delivered to the said two trustees simultaneously with the execution and delivery of the mortgage, and some of them afterward, in all 183 in number. Some of the bonds thus issued were delivered directly to creditors of the company in payment of the debts of the company; some were sold, and the proceeds applied in payment of debts, and some were sold and the proceeds used in working the mines subsequent to the issuing of the bonds. It was not definitely proved how much of the bonds or moneys were used for each purpose, or that they were all used for all the purposes.

Default having occurred in payment of the bonds in 1870, the two trustees gave notice of the sale of the mortgaged

property at the Exchange salesroom, No. 111 Broadway, New York, according to the terms of the mortgage.

Before the day of sale the plaintiff, a stockholder, alleging substantially the foregoing and other pertinent facts, and among them, that the directors of the company refused, upon request, to prosecute this action—commenced this action, and prayed for relief that the said two trustees be enjoined from making the sale in pursuance of these notices, and that the mortgage be declared null and void.

Upon these facts the referee found, as conclusions of law, substantially that the mortgage was void, and that the sale should be restrained.

T. B. ELDRIDGE, for the appellant.

JOSHUA M. VAN COTT, for the respondents.

EARL, C.

The referèe held that the mortgage was void and of no effect, and that it should be delivered up and canceled, and that the defendants White and Wall, the trustees, should be perpetually restrained from selling the mortgaged property under the power contained in the mortgage. Hence, if the mortgage was a valid security for any amount, the General Term properly reversed the judgment entered upon the report of the referee.

This company was organized under the general act "to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes." Chap. 40, Laws of 1848. The second section of that act provides that any company formed under that act shall be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable it to carry on its operations, "but shall not mortgage the same or give a lien thereon." This latter clause is an abridgment of the powers which such corporations would otherwise have. Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money, or their debts: Angell & Ames on Corp., 191; *De Ruyter v. St. Peter's*

Church, 3 N. Y. 238; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280; *King v. Merchants' Exchange*, 5 N. Y. 547; *Richards v. Merrimack Railroad*, 44 N. H. 127. This clause was modified by section 2 of chapter 517 of the Laws of 1864, which provides that any corporation formed under the act of 1848, "may secure the payment of any debt," "by mortgaging all or any part of the real estate," "provided that the written assent of the stockholders, owning at least two thirds of the capital stock of such corporation, shall be first filed in the office of the clerk of the county where the mortgaged property is situated." This provision removes the restraint as to mortgaging real estate, leaving the restraint as to mortgaging personal property still in force. A mortgage upon real estate is allowed only to secure the payment of debts. It can not be made to raise money merely to carry on the operations of the company.

It was manifestly the intention of the directors of this company, and of the stockholders who gave their assent to the mortgage, that the bonds secured by the mortgage should be used, not only to pay debts, but also to raise money to carry on the business of the company. It is also manifest that the bonds were used for both purposes; and it is claimed that this invalidates the mortgage. There is no proof or finding that the bonds were fraudulently issued or that the mortgage was fraudulently made, and hence it can not be claimed that the mortgage was void or voidable on that account. Some bonds were issued and used for a proper purpose, and so far as the mortgage secures such bonds, how can it be held illegal and invalid? Creditors who have taken such bonds for the payment of the debt of the company due them, have the right, through the trustees named in the mortgage, to rely upon and resort to the security. It may be that the bonds not delivered to the creditors were taken and are now held by *bona fide* holders, and that they are valid in their hands; and that as against such holders the company, which has appropriated and had the benefit of the bonds issued, is estopped from claiming the invalidity of the mortgage, and that without restoring what it has received, it can not repudiate either the bonds or the mortgage. And it is quite plain that the same principle which in such cases would estop the company would estop any stockholder of the company. *Zabriskie v. Cleveland R. R.*,

23 How. (U. S.), 381; *Parish v. Wheeler*, 22 N. Y. 499; *Ranger v. Great Western Railway*, 5 H. L. C. 86; *Muckay v. Commercial Bank*, 5 Privy Council Cas. 394; *Moran v. Miami County*, 2 Black, 722; *State v. Union Township*, 8 Ohio St. 394; *Society for Savings v. City of New London*, 29 Conn. 174. Hence there is nothing in the preliminary proceedings, nor in the circumstances thus far alluded to, which lay the foundation for the decision of the referee.

Neither is the mortgage invalid because it purports to mortgage the franchises of the company, and its personal property as well as its real estate. A corporation, without some statute allowing it, can neither sell nor mortgage its franchises: *Susquehanna Co. v. Bonham*, 9 Watts & S. 27; *Arthur v. Coml. Bk.*, 9 Smedes & M. (Miss.), 394; *New Orleans R. R. Co. v. Harris*, 27 Miss. 517; *Stewart v. Jones*, 40 Mo. 140. Hence, this mortgage, so far as it purports to convey the franchises of the company, is simply inoperative. The trustees therein named could not sell and give title to the franchises, and there was no occasion for any interference of a court of equity to prevent such an attempted sale. Unless the doctrine of estoppel should apply, the mortgage was also, upon its face, invalid as to the personal property, and the trustees could not sell and give title to the same. But there is no reason for equitable interference as to the personal property. If the trustees had the right to sell it, equity ought not to interfere. If they had no right to sell it under the mortgage, then there is no ground disclosed in the evidence or the findings of the referee which call for equitable interference. It does not appear how much personal property there was, nor how or to what extent the company or the stockholders would be damaged by its sale. If equity could interfere at all in such a case, it would be only to prevent a serious and irreparable mischief. But, in any event, the mortgage would be valid as to the real estate, and that is sufficient for our present purpose.

If this mortgage can properly be said to have been given to secure the payment of any debts, I can perceive no objection to its form. The statute prescribes no form, and there is no rule of law which requires a mortgage upon real estate to be in any particular form. The mere deposit of title deeds to secure the payment of money borrowed is an equitable mortgage: *Rock-*

well v. Hobby, 2 Sandf. Ch. 9; *Jackson v. Parkhurst*, 4 Wend. 369. An absolute conveyance given as security and a defeasance bearing the same date is a mortgage: *Jackson v. Green*, 4 Johns. 186; *Peterson v. Clark*, 15 Id. 205. A sealed grant of land for the term of one year on rent, and conditioned to be void on payment of a certain sum, with a covenant to pay it, is a mortgage: *Elliott v. Pell*, 1 Paige, 263. A deed absolute on its face may be shown to be a mere security for money, and thus a mortgage: *Hodges v. The Tennessee Ins. Co.*, 8 N. Y. 416; *Murray v. Walker*, 31 N. Y. 399. In all cases, no matter what the form of the mortgage may be, there is a right of redemption before foreclosure. In this case, the instrument executed to secure the bonds appears upon its face to be a mortgage, and to have been given simply as security. It may, in one sense, be called a trust deed, but it was intended as a mortgage security.

It is not in conflict with the statute, because it mortgaged the future as well as present real estate of the company. There is nothing in the statute which limits the effect of the mortgage to the present real estate of the company, and nothing in the nature of a mortgage security which can thus limit its effect: *Seymour v. Canandaigua R. R.*, 25 Barb. 284; *Fisk v. Potter*, 2 Abb. N. Y. Ct. of App. Dec., 138; besides there was no proof that there was any after-acquired real estate.

There is no objection to the mortgage because it authorized a sale, after certain notices specified, in the city of New York, of real estate situate in Colorado. Our statute in reference to the sale of mortgaged premises under a power of sale contained in a mortgage has reference only to real estate and mortgages recorded in this State: *Elliott v. Wood*, 45 N. Y. 71. In the absence of any statute regulation, under any system of laws, the parties to a mortgage must have the power to agree upon the manner in which the property may be sold to realize the security. In *Elliott v. Wood*, *supra*, Judge Allen says: "The power of sale was a part of the security, and its terms, so far as consistent with law, were matters of conventional arrangement between the parties."

Our statutes have no force in Colorado, and there was no proof or claim upon the trial that a sale under this mortgage

in the city of New York was in conflict with any law of Colorado. The terms provided in the mortgage upon which sale could be made were fair and just, in no sense oppressive, and not illegal, and hence they furnish no ground for equitable interference in this case.

I am now brought to the last question which I propose to consider. The referee, as appears from his opinion, held the mortgage to be void, upon the ground that it was not given to some creditor to secure some debt of the company. He construed the statute of 1854 to authorize a mortgage only to some creditor, and this view of the statute the general term held to be erroneous, and I agree with it. The object of the statute was to enable a company to secure its debts. It could not have been contemplated that it should be obliged to execute a separate mortgage to each one of its creditors. Such a construction of the statute would be mischievous and inconvenient. It would enable one creditor to get a priority over others, and would largely increase the expenses in case of default. A single mortgage to one person, in trust for the security of all the creditors, will accomplish the purpose of the statute, and lead to no mischievous consequences which I can perceive. Such a mortgage is given to secure the payment of the debts of the company. The statute does not, in its terms or its spirit, require that it should be given directly to the creditors. Mortgages to one person in trust for the benefit of others have frequently been used, and upheld by the courts; *De Ruyter v. St. Peter's Church*, 3 N. Y. 238; *King v. Merch. Ecch.* 5 Id. 547; *Bucklin v. Bucklin*, 1 Abb. Ct. of App. Dec., 242.

But it is further claimed that this mortgage was not given to secure the payment of debts, because it was given to secure the payment of the bonds, and this was also the view of the referee. All the statute requires is, that the mortgage should be given to secure the payment of the debts. The mode in which this should be done was left to the company. It might be by a mortgage directly to the creditors, or to trustees for their benefit, or by a mortgage to secure bonds issued and delivered to the creditors, or sold to raise money to pay them. In either form, the mortgage secures the payment of the debts, and accomplishes the purpose of the statute. As to

the bonds actually delivered to the creditors, there can be no question. The debts due to them continued to exist, and were secured by the bonds and mortgage in every sense. The same is true of the bonds sold for money to pay the debts. The company owed \$250,000; suppose that it had sold bonds for the whole amount and used the proceeds to pay the debts, it would still owe \$250,000, and in a broad sense, it would be the same debt. Its form, and the persons holding it, would simply be changed. Hence, I think that neither the letter nor spirit of the statute was violated by this mortgage: *Richards v. Merrimack R. R.*, 44 N. H. 127.

The order of the general term must be affirmed, and judgment absolute ordered against the plaintiff with costs.

LOTI, Ch. C., GRAY, DWIGHT and REYNOLDS, C. C., concur, except that they express no opinion as to the validity or invalidity of the mortgage as security for the bonds which were not delivered to pay debts or used to raise money to pay debts existing at the time the mortgage was executed.

Order affirmed and judgment accordingly.

TIPTON GREEN COLLIERY COMPANY v. TIPTON MOAT COLLIERY COMPANY.

(Law Report, 7 Chancery Division, 192. High Court of Justice, 1877.)

¹ **Allowance to mortgagee for improvements and repairs.** In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances;" but to entitle him to "permanent improvements" or "substantial repairs" he must make out a case for them at the trial.

The plaintiffs in this action were the purchasers, and the defendants the vendors, of certain leasehold coal mines called the Moat Colliery, in Staffordshire, the purchase money being payable by installments under a deed of arrangement. The plaintiffs having made default in payment of one of the

¹ *Harper's App.*, 64 Pa. St. 315.

installments, the defendants took possession of the colliery by way of enforcing their lien for the unpaid portion of the purchase money and proceeded to work the colliery on their own account.

The plaintiffs then brought this action, claiming amongst other things, that they should be allowed to redeem the colliery on payment of the unpaid balance of purchase money and interest thereon, as though the defendants were mortgagees in possession under the powers of an ordinary mortgage deed, and that for that purpose all necessary accounts should be taken.

In their statement of defense the defendants submitted to account for profits made by them in working the colliery.

The action came on for trial on the 6th of August, 1876, when his lordship made the "usual redemption decree" as against mortgagees in possession.

According to the minutes of decree as given out by the registrar, the only accounts directed were: First, an account of what was due to the defendants for unpaid purchase money, interest, and the cost of the action; and secondly, an account of rents and profits received by the defendants. And it was ordered that upon the plaintiffs paying to the defendants what should be found due to them for unpaid purchase money, interest and costs, after deducting therefrom the amount of rents and profits received by the defendants, the defendants should re-surrender the colliery to the plaintiffs, or that, in default, the action should stand dismissed.

The defendants now moved that the minutes as so given out should be altered or varied by including, amongst other things, an account of what was due to the defendants for moneys expended by them in "necessary repairs or permanent improvements, or in the preservation" of the colliery.

No claim was made in the statement of defense for expenses of repairs or permanent improvements, nor was it proved at the trial that the defendants had incurred any such expenditure.

CHITTY, Q. C., and RUSSELL ROBERTS, for the motion.

DAVEY, Q. C., and PHIPSON BEALE, for the plaintiffs.

JESSEL, Master of the Rolls.

As I understand, the mortgagee in a redemption suit never has permanent improvements allowed unless he proves at the trial that there are some and gets them inserted in the decree. The law is so stated in *Fisher on Mortgages*, 3d Ed. p. 952, where it is said that "to entitle a mortgagee to an inquiry as to money laid out in lasting improvements, he need not prove at the hearing what precise sums were so laid out; yet no inquiry will be granted on his bare allegation, without evidence that he has laid out money for the purpose." Mr. Fisher also says (7), and says correctly, that "the words 'all just allowances' in a decree, cover all payments to which the mortgagee is entitled under the terms of his security," except lasting improvements; and I think that necessary repairs are included in the words. As an authority for that, I will refer to Lord Langdale's judgment in *Sandon v. Hooper*, 6 Beav. 246, where he says: "The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with his mortgaged property, several cases have occurred at different times, showing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for."

I am, therefore, clearly of opinion that under "just allowances" which are supposed to be in the decree, you will get necessary repairs. If you want anything else, such as improvements, or what are sometimes called "substantial repairs," you must ask for them; but then you must not only allege, but also prove them.

Therefore "permanent improvements" the defendants will not get, but "necessary repairs" they will get, under "just allowances."

The first account directed by the decree may be "of what is due to the defendants for unpaid purchase money and interest, or otherwise," which will carry everything; then it will go on in the usual way to provide for the costs of the action.

The decree will be dated as from to-day, and I shall give no costs of this motion to either party.

THE AMERICAN TRUST COMPANY OF NEW JERSEY V.
THE NORTH BELLEVILLE QUARRY COMPANY ET AL.

(31 New Jersey Equity, 89. Court of Chancery, 1879.)

Stone severed after mortgage—Prior lien of workmen. After a decree for sale of mortgaged premises and execution issued thereon against the mortgagor, an insolvent corporation, it quarried stone from the mortgaged premises, which stone remained on the premises. *Held*, that the stone was subject to the lien of the mortgage, but that under the circumstances it must be postponed to the lien for the quarrymen's wages.

Mortgagee allowing mortgagor to work a quarry as his own: *Held*, to have let in an intervening lien.

Bill to foreclose. Petition of the receiver (in insolvency) of the complainants for an injunction to restrain the defendants (the quarry company) from removing or disposing of stone quarried on the mortgaged premises by them since the decree was made and execution issued in the cause. On motion to dissolve the injunction on petition and affidavit annexed, and affidavits on behalf of the quarry company.

W. S. WHITEHEAD, for the motion.

CORTLANDT PARKER, *contra*.

RUNYON, chancellor.

The mortgagors move to dissolve the injunction on the ground that the stone which, by the writ, they are restrained from removing or disposing of, has been separated from the quarry, and is, therefore, free from the lien of the mortgage. They also urge that about sixty per cent. of its present value has been given to it by the labor bestowed upon it by their employes.

The decree for sale of the mortgaged premises was made, and the execution issued thereon, in 1875. The premises then were, as they ever since have been, in the possession of the mortgagors; they are an insufficient security for the mortgage

debt, and the mortgagors are insolvent. The stone which the petitioner seeks to hold by means of the injunction was quarried from the premises, by the mortgagors, after the execution was issued, and lies on the property. It has not been sold or pledged.

The lien of the petitioner is, under the circumstances, valid as between him and the mortgagors. The decree ordered that the premises be sold to pay the mortgage debt, and the sheriff was directed to sell them accordingly. The mortgagees stayed the execution of the decree, and left the property in the possession of the mortgagors. The latter, with a view to selling the stone, which was part of the realty, quarried it. The fact that they so removed it and expended labor on it, would not, as between them and the mortgagees, divest the lien of the mortgage or put the stone beyond the reach of the decree and execution. It does not appear that any third party has any claim on the stone superior to that of the petitioner, except the workmen of the mortgagors, who may claim a lien for wages under the sixty-third section of the act concerning corporations. That lien would, under the circumstances, be paramount. The mortgagors are, in fact, an insolvent corporation, and proceedings have been taken in this court, in view of their insolvency, for the appointment of a receiver on the application of their workmen. Those proceedings are in abeyance only to afford the mortgagors an opportunity to pay the workmen. The mortgagees have permitted the mortgagors to deal with the mortgaged premises as if they were their own, notwithstanding the decree and execution. Their lien must, as to the stone in question, be postponed to that of the workmen.

The injunction will be modified so as to permit the mortgagors to sell so much of the stone as may be necessary to pay the wages of the workmen.

YOUNG v. NORTHERN ILLINOIS COAL AND IRON CO.

(9 Bissell, 300. Circuit Court of the United States, Northern District of Illinois, 1880.)

¹Mortgagor entitled to income of property. Until the mortgagee of a coal mine takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from operating the same.

Assignment of drafts—Advances on mine proceeds. The mortgagor, prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently, and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank.

Idem—Conflicting equities of creditors. The fact that, at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank.

Bill to foreclose.

Intervening petition of First National Bank of Mendota.

MATTOCKS & MASON, for petitioner.

LAWRENCE, CAMPBELL & LAWRENCE, for respondent.

BLODGETT, J.

The original cause is a bill in equity to foreclose a mortgage given by the Northern Illinois Coal and Iron Company to complainant's testator upon certain coal mines and coal lands situate in LaSalle county in this State.

The mortgagor continued in possession of the mortgaged property and operated its mines in the usual manner, by raising and selling coal therefrom, until after this bill was filed.

¹ *Teal v. Walker*, 111 U. S. 242.

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On the 29th day of July, 1876, an order was made in the cause appointing a receiver, and directing him to take possession of the mortgaged property and to collect outstanding dues, demands and accounts of the company.

On the first day of August the receiver gave bond and qualified, and on the second day of August he took possession of the mines and mining property.

It also appears that for several years prior to the appointment of the receiver, the coal company had had dealings with the First National Bank of Mendota, mostly in the way of short loans of money and discount of drafts drawn by the company upon the persons and railroad companies to whom the coal company had sold coal, and I think the fair inference from the disclosed facts is, that these drafts, when given, were treated rather as collateral security for the amounts advanced upon them by the bank to the company, than as an absolute transfer to the bank of the indebtedness against which the drafts were drawn, because the proof shows that the money due from customers on the drafts were often collected by the officers of the coal company and paid over to the bank, and on one or more occasions such money was retained and used by the coal company, and the bank paid from other sources by the coal company.

On or about the 7th day of July, 1876, the bank agreed with the officers of the coal company to discount, presumably upon the basis of their former dealings, three drafts to be drawn by the coal company, as follows:

On the Clinton, Dubuque & Minnesota R. R. Co. for.....	\$ 900
On the Illinois Central R. R. Co.....	2,000
On the C., R. I. & P. R. R. Co.....	1,100
	<hr/>
	\$4,000

Instead of taking these drafts to the bank to be discounted, after making the arrangement, the superintendent of the company took to the bank the notes of the company indorsed by Colonel Taylor, for \$4,000.

The bank at first refused to discount these notes, but finally concluded to do so provided the superintendent would write across the face of the notes, "To be paid in drafts on the respective roads," which was done, and the bank thereupon discounted the notes. At the same time the bank discounted

for the company a note of the Chicago Stove Works for \$291, and a note made by Warren, Clark & Co., for \$523. The net proceeds of the \$4,000 note, and the two small notes paid by the bank to the coal company was \$4,741, \$1,608 of which was applied to the payment of indebtedness then due the bank from the coal company, and the balance of \$3,133 was paid in cash to the coal company, and the money so obtained was applied by the coal company to the payment, as far as it would go, of its laborers. Within a few days after this transaction, Colonel Taylor returned from New York, when the \$4,000 notes were taken up and three drafts drawn by the company and indorsed by Colonel Taylor and his wife in favor of the bank, substituted in their place.

Draft July 7, 1876, at 30 days, on C. H. Booth, Treas. Clinton, D. & M. R. R. Co.	\$900
Draft July 7, 1876, at 30 days, on J. C. Willing, Treas. Illinois Central R. R. Co.	2,000
Draft July 7, 1876, at 30 days, on W. G. Purdy, Treas., C., R. I. & P. R. R. Co.	1,100
	<hr/>
	\$4,000

And on the 4th day of August, 1876, four days after the receiver was appointed and qualified, the superintendent of the coal company delivered to the bank four drafts, as follows:

Draft dated August 1, 1876, due August 25, on C. H. Booth, Treas. C. D. & M. R. R. Co., for	\$ 756.00
Draft dated August 1, 1876, due August 15, on J. C. Willing, Treas. Illinois Central R. R., for	1,559.30
Draft dated August 1, 1876, due August 15, on W. G. Purdy, Treas. C., R. I. & P. R. R. Co., for	1,356.20
Draft dated August 1, 1876, at 10 days sight, on J. W. Parker & Co., for	900.00

The last set of drafts drawn on the Illinois Central, Chicago, Rock I. & P. R. R. Co. and the Clinton, D. & Minn. R. R. Co., were for the actual amounts due from those companies to the coal company for coal delivered them by the coal company during the month of July.

The J. W. Parker & Co. draft was given to make up the full amount of the paper taken up. And notice was given the receiver of the giving of the new drafts.

At the time the receiver took possession there was no entry

of these drafts upon the books of the coal company, but the amounts represented by them stood in the form of open accounts against drawees.

On the second day of August, Colonel Taylor, as president of the coal company, called at the office of the Illinois Central R. R. Co. and signed a receipt in full for the coal delivered in July, and requested that a check be sent the bank for the amount of the draft of August 1st.

The bank notified the treasurer of the Chicago, Rock I. & P. Co., that draft had been drawn, by letter dated August 10th, and asked payment to bank, or that money be held by R. R. Co., subject to the decision of the court. None of these drafts were ever accepted on their face by the drawees thereof.

On the 4th day of August, 1877, an order was entered by this court, directing that the drawees of these drafts should pay the several sums due from them to the coal company to the receiver, without prejudice to the right of the bank to claim and receive said indebtedness from the receiver in case the claim of the bank to said moneys, as set up in this intervening petition, should be established; and in pursuance of this order, the amounts due from the Ill. Cent. R. R. Co. and the C., R. I. & P. R. R. Co. to the coal company have been paid into the hands of the receiver.

It also appears that at the time the receiver took possession of the mines the coal company was in arrears to its laborers for labor in the working and care of the mines, to the amount of about \$9,000, and that the receiver was, by order of court, directed to raise the money and pay off this indebtedness by the issue of certificates which should be a lien on all the assets of the coal company in the hands of the receiver.

It appears to me, upon more mature reflection, that the money advanced by the bank to the coal company on the transaction of July 7th, was in fact advanced upon the faith that the bank was to be secured by the pledge of drafts upon these railroad companies—a memorandum to that effect was made upon the \$4,000 notes at the time—and on Colonel Taylor's return the notes were taken up and drafts given to the amount of the notes. These drafts were drawn for the assumed or approximate amounts of the coal bills, which would be due to the coal company from the drawees, on the July

accounts, because the coal for the month had not been delivered, and the exact amount of the accounts could not be then ascertained. Yet I think the facts show that these drafts were intended by the parties to operate as an equitable assignment to the bank, of whatever should be due from the railroad companies to the coal company, for coal delivered in July. That the coal company had the right to do this there can be no doubt.¹

Until the mortgagee takes possession of the mortgaged property, either in person or by receiver, the mortgagor has the right to the income of the property; especially is this true in the case of a mortgage of property like this, which does not bear a fixed rental, but where the income is derived by working or operating the property, requiring a constant expenditure of money to make it productive.

The accounts due from the drawees of these drafts did not in any sense, either legally or equitably, belong to the mortgagees. They belonged to the coal company, and its officers had the right to pledge them, even in advance, for the purpose of securing the means of carrying on the business of the company, and I have no doubt that the transactions between the parties were intended as a pledge or assignment of these accounts, and should be so considered by the court.

The notes for \$4,000, given July 7th, and the first set of drafts, were evidently intended only as temporary securities, to stand until the correct amounts for which drafts should be drawn on each customer of the coal company could be ascertained, and the drafts of August 1st were only the consummation of the previous agreement of the parties.

It is quite clear, I think, that the bank could have held and collected these funds as against the coal company, on the drafts of July 7th, given to take up the notes; and if it could have done so, then it can and should be allowed to hold and collect the indebtedness which those drafts represent, as against the mortgagee; for, in respect to these claims, the receiver stands only in the tracks of the coal company, and must be bound by whatever binds that company.

It is urged that, inasmuch as the receiver found the coal

¹ *Gilman v. Tel. Co.*, 1 Otto, 616; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459.

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company in debt to its miners, and was obliged to raise a large sum of money to pay off this indebtedness, a stronger equity attaches to this fund in favor of the mortgagee, who was obliged to make the advances necessary to pay the men. But it must be remembered that this indebtedness to the bank and that to the men were both the debts of the coal company, and the demands represented by these drafts were assets of the coal company. Clearly, the coal company had the right to assign or pledge these claims to secure the debt due the bank, and the court must respect the right of the bank thus created. The coal company had in effect specifically appropriated these claims to the bank, and the appointment of the receiver can not defeat rights which have thus been created. If these assets had come to the hands of the receiver unincumbered by any previous pledge or assignment by the coal company, I have no doubt the court could have directed their application to the payment of the debts of the coal company incurred in the operation of the property; but the court can not divest rights to these funds which had accrued prior to the appointment of the receiver. Besides, it may be said that the mortgagee was under no legal or moral obligation to pay these laborer's claims. They were ordered paid because it was deemed expedient to do so rather than incur the risk of a riot or strike by the employes of the mine.

Order that receiver pay to bank the sums collected on accounts due from the Illinois Central and the Chicago, Rock Island & Pacific Railroad companies, and costs.

BROPHY MINING Co. v. BROPHY AND DALE GOLD
AND SILVER MINING Co.

(15 Nevada, 101. Supreme Court, 1880.)

Reconveyance of title to mortgagee. S. held a deed of mining ground as a mortgage to secure an existing indebtedness; he conveyed the premises to P. and after two or more transfers of the title, the property was redeeded to S. *Held*, that when the title returned to S. the same equities attached to it in his hands as existed at the time he made the conveyance to P.

¹Quit-claim deed conveys legal title — Protects bona fide purchaser.

A quit-claim deed conveys whatever interest the grantor has in the property at the time the conveyance is made, and, although it is intended as a mortgage, it will, if absolute in form, vest the legal title in the grantee, and is sufficient to protect the rights of an innocent purchaser for value.

The bona fide purchaser of a legal title is not affected by any latent equity of which he has no notice, actual or constructive.

Payment of purchase money before notice of outstanding equities. A mining claim was purchased for one thousand dollars in coin, and fifteen thousand shares of stock in a corporation thereafter to be formed. The money was paid, but only a portion of the certificates for shares of stock were delivered to the grantor before the purchaser received notice of the equities of plaintiff: *Held*, that the purchase money was paid before notice.

No constructive notice from possession retained by grantor. The continued possession of a mining claim by the grantor after he had conveyed the legal title, would not be notice to a subsequent purchaser of any unrecorded defeasance held by such grantor. (HAWLEY, J.)

Appeal from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

KIRKPATRICK & STEPHENS, and R. H. TAYLOR, for appellants, the defendants below.

SEELEY & WOODBURN, for respondents.

By the Court, HAWLEY, J.

This is an action of ejectment.

Both parties deraign title to the mining claim in controversy from one William Brophy. The material facts are as follows:

On the fifteenth day of September, 1874, Brophy being then the owner and in possession of the mining ground, executed and delivered to M. C. Sullivan a quit-claim deed for said premises.

This deed, though absolute in form, was intended as a mortgage to secure an existing indebtedness, then due and owing from said Brophy to said Sullivan, and to secure said Sullivan

¹ *Brown v. Warren*, 16 Nev. 228; *Brown v. Banner Co.*, 97 Ill. 214; *Bradbury v. Davis*, 3 M. R. 398.

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for any future indebtedness that might thereafter accrue to him from said Brophy.

Sullivan, on the thirtieth day of September, 1878, conveyed the premises to Thomas B. Pheby. On the fifteenth day of November, 1878, Pheby conveyed the same to Henry Rosener. On the twentieth day of March, 1879 Rosener conveyed the premises to Sullivan. On the same day, March 20th, Sullivan conveyed the premises to F. Tagliabue. At the time of the execution of the last mentioned deed it was agreed between Sullivan and Tagliabue that a corporation should be formed by said Tagliabue, to which the title and interest of said Sullivan should be transferred; that in consideration of such transfer Sullivan was to receive one thousand dollars in coin, and fifteen thousand shares of the stock of said corporation, to be delivered at stated periods thereafter. Tagliabue conveyed the premises to the corporation, and it was organized in pursuance of said agreement. The capital stock was divided into one hundred thousand shares of the par value of one hundred dollars per share. Tagliabue subscribed for ninety-nine thousand six hundred shares, and upon its organization became, and still is, the president and one of the directors thereof.

One thousand dollars was paid by Tagliabue to Sullivan at the time of the execution of the deed. One thousand shares of stock were delivered to Sullivan on the first day of April; four thousand on the fifteenth or twentieth of May; five thousand on the twenty-seventh of June, 1879, and five thousand remained in the hands of the company to the credit of Sullivan at the time of the trial.

On the thirty-first day of March, 1879, William Brophy conveyed the same premises to one J. H. Lieman, and the said Lieman on the twelfth day of April, 1879, conveyed the same to the corporation, defendant and appellant, in this action.

The deeds executed by the respective parties were all quit-claim deeds.

The complaint alleges that the defendants wrongfully entered upon said premises on the first day of January, 1879. On the nineteenth day of August, 1878, M. C. Sullivan brought suit in the District Court of Storey County to have

the deed from Brophy to him adjudged to be a mortgage, and to have the same foreclosed.

This suit, on the eighth day of October, 1878, was, on motion of Sullivan, and before it was brought to issue, dismissed.

The court, in addition to the facts already stated, found "that the plaintiff at the time of the commencement of this action was and now is the owner in fee of the premises in dispute and entitled to the possession thereof; that at the time of the commencement of this action, defendant was wrongfully in possession of said premises, unlawfully holding them adversely to the plaintiff."

And as conclusions of law the court "found that plaintiff is entitled to judgment in its favor, and against defendant, for the possession of the premises and for costs of the suit."

As applicable to the equity branch thereof, the court, among other facts, found "that said Tagliabue was a *bona fide* purchaser of said premises, for value and without notice of any of the equities mentioned in defendant's answer at the time of said purchase; that he had paid the entire purchase money, and received his conveyance before notice of any of said equities; that said Tagliabue on or about the twenty-fourth day of March, 1879, by deed, conveyed to said plaintiff said premises; that said plaintiff took said conveyance in the capacity of a *bona fide* purchaser for value and without notice of defendant's claimed equities.

As conclusion of law the court found: "That plaintiff is owner in fee of said premises, holding the premises as a *bona fide* purchaser, for value, without notice of any equities in favor of defendant; that defendant is entitled to no relief, and judgment and decrees are ordered accordingly."

1. Is respondent a *bona fide* purchaser?

Has it shown that the purchase was made in good faith, for a valuable consideration; that the purchase price was wholly paid, and that the conveyance of the legal title was received before notice of the equities of appellants?

In the consideration of these questions it is only necessary to determine the effect of the transaction as between Sullivan and Tagliabue. When the title returned to Sullivan the same equities attached to it in his hands as existed at the time he

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made the conveyance to Pheby. 1 Story Eq. Jur., Sec. 410; Wade on Law of Notice, Secs. 63, 243; *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Troy City Bank v. Wilcox*, 24 Wis. 671; *Church v. Church*, 25 Pa. St. 278.

If Tagliabue is bound by the equities of appellant, then respondent is bound. The knowledge of each is identical.

Was Tagliabue a *bona fide* purchaser?

Appellant claims that inasmuch as Sullivan could not have maintained an action of ejectment against Brophy, or his vendees, to recover possession of the premises, it follows that Tagliabue, claiming from Sullivan under a quit-claim deed, can not maintain such an action.

This position, under the facts of this case, is not tenable.

A quit-claim deed is sufficient to convey whatever interest the grantor had in the property at the time the conveyance was made. As between Sullivan and Brophy the deed executed by Brophy to Sullivan was a mortgage, but being absolute in form it vested the legal title to the property in Sullivan: *Hughes v. Davis*, 40 Cal. 117. Hence it follows that the deed executed by Sullivan was sufficient to convey the legal title to Tagliabue.

The mere fact that this conveyance was a quit-claim deed does not deprive Tagliabue of the character of a *bona fide* purchaser. *Chapman v. Sims*, 53 Miss. 154; *Wilson v. Western N. C. L. Co.*, 77 N. C. 445; *Flagg v. Mann et al.*, 2 Sumn. 562. If Tagliabue took this conveyance in good faith and paid a valuable consideration therefor, without notice of the facts relied upon to convert the deed from Brophy to Sullivan into a mortgage, he acquired the title to the premises. *Conner v. Chase*, 15 Vt. 775; *Whittick v. Kane*, 1 Paige Ch. 208; *Stoddard v. Rotton*, 5 Bos. 378.

The court in *Conner v. Chase*, in discussing, this question, said:

"If the deed from the orator to Chase could have been treated as a mortgage between them, at the time it was executed, it would not have that character as to subsequent purchasers under Chase, nor would they be affected by any agreement between the orator and Chase, * * * unless the purchasers had full knowledge of the character and nature of the contract and agreement between the parties, and pur-

chased fraudulently, and with the intent thereby to defeat the right of the grantor, the orator in this bill. Under our recording system, a purchaser of one who has the legal title and possession, is not to be affected by the disputes and claims between the legal owner and the claimant in equity, when no suit is pending between them."

When a conveyance, absolute upon its face, is intended as a mortgage, the purchaser from the grantee, with notice of the facts, stands in the place of the equitable mortgagee. But where a deed intended as security is recorded, the defeasance not being recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed, as regards third persons, and a *bona fide* purchaser will take the land discharged of the equity of redemption of the mortgagor. Thomas on Mortgages, 156; *Mills v. Comstock*, 5 Johns. Ch. 214.

The truth is, as stated by Mr. Washburn in his work on Real Property, that "questions as to the effect of parol agreements, or separate instruments upon deeds absolute in their terms, can only arise between the parties or purchasers with notice." 1 Wash. R. P. 496.

The decisions are uniform that the *bona fide* purchaser of a legal title is not affected by any latent equity founded either on a trust, incumbrance, or otherwise, of which he has no notice, actual or constructive: *Hogarty v. Lynch*, 6 Bos. 138; *Hogan v. Jaques*, 19 N. J. Eq. 124; *Gray v. Coan*, 40 Iowa. 327; *Hull v. Swarthout*, 29 Mich. 249; *Carter v. Allen*, 21 Grat. 249; *Bassett v. Nosworthy*, 2 Eq. Lead. Cas. pt. 1, p. 32 *et seq.*, and authorities there cited.

2. Was the purchase money paid before notice? The evidence in my opinion, shows that it was.

The property was purchased by Tagliabue for one thousand dollars, which was paid at the time of the execution and delivery of the deed. This was the real consideration of the property purchased.

It is true that it was further agreed that a corporation should be formed, and that certificates for fifteen thousand shares of stock representing three twentieths of the mine should be thereafter delivered to Sullivan. When the cor-

poration was organized these shares were placed to his credit; but, as before stated, all of the certificates were not delivered to Sullivan prior to Tagliabue's receiving notice of appellant's equities. Under the agreement Tagliabue was only entitled to shares of the stock representing seventeen twentieths of the mine. For this he paid the full consideration at the time of his purchase. He had parted with everything of value to him before receiving any notice. Neither he nor the corporation had any interest in, or claim to the shares of stock agreed to be delivered to Sullivan.

Under these circumstances it seems to me that it can not consistently be claimed that the purchase money was not wholly paid before notice.

3. Was the possession of Brophy sufficient to put Tagliabue upon inquiry as to Brophy's equitable rights?

This is the most important question presented in this case.

As a general rule the authorities declare that open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all legal and equitable rights in the premises of such party in possession and in subordination to these rights; and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in the premises in behalf of the party in possession.

It does not clearly appear that Tagliabue had actual notice of Brophy's possession at the time he purchased the property, and if the rule above stated is applicable to the facts in this case, it is, in my opinion, very doubtful whether Brophy's possession is shown to be of such an open and notorious character as to impart constructive notice.

From the views I entertain of this case it may be admitted that the pleadings and proofs show that Tagliabue had notice of the fact that Brophy was in possession of the property on

the first day of January, 1879, and that he continued in the possession thereof up to and at the time of the delivery of the deed from Sullivan to Tagliabue.

This presents the question whether the fact of the possession of real estate or mining property, by a vendor thereof, after transfer of his legal title thereto by deed, is sufficient to put a subsequent vendee of the same premises, while so in the possession of the original vendor, upon inquiry as to the equitable rights of such original vendor, and subject such subsequent purchaser to the same rules as when a stranger to the title of his vendor, as of record, is in possession. Upon this point the authorities are conflicting. Section 26 of the act concerning conveyances in this State provides that every conveyance of real estate, "which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith, and for a valuable consideration, of the same real estate or any portion thereof, where his own conveyance shall be first duly recorded." 1 Comp. L. 254.

In California, under the provisions of this act, the Supreme Court decided that it was the intention of the act to protect the purchaser of the legal title against latent equities, and to abolish the presumption of notice arising from possession: *Mesick v. Sunderland*, 6 Cal. 297.

In *Daubenspeck v. Platt*, 22 Cal. 333, the court, without any reference to the statute or to the previous decisions, in a case where property was conveyed by a deed absolute upon its face and a defeasance in the form of an agreement to reconvey the property upon the payment of a stipulated sum of money within a certain time, and where the deed was recorded, but the defeasance was not recorded, declared that the possession of the mortgagor was sufficient to put subsequent purchasers upon inquiry and to charge them with the rights of the mortgagor.

In *Pell v. McElroy*, 36 Cal. 268, the court discuss this question at length, and arrive at the conclusion that the continued possession of a vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subject him to the general rule heretofore announced in case

of the party in possession being a stranger to the title as of record. As a reason given for this conclusion, the court say: "An absolute deed divests the grantor not only of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we can not appreciate the justice, sound reasoning, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He can not be regarded as a *purchaser in good faith* who negligently or willfully closes his eyes to visible, pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

There are other authorities which maintain this to be the correct doctrine.

I am, however, of opinion, that the continued possession of the land by Brophy after he had conveyed the legal title to Sullivan, would not be notice of any defeasance held by him which was not recorded.

In Massachusetts, under a statute similar to that of California and of this State; the Supreme Court have frequently decided that the open and notorious possession by the grantor will not be sufficient to impart notice to the purchaser of any unrecorded defeasance: *Pomroy v. Stevens*, 11 Met. 244; *Hennessey v. Andrews*, 6 Cush. 171; *Mara v. Pierce*, 9 Gray, 306; *Parker v. Osgood*, 3 Allen, 487; *Dooley v. Wolcott*, 4 Id. 407; *Lamb v. Pierce*, 113 Mass. 73.

In Indiana, under a similar statute, the decisions are to the same effect. In discussing this question, the court, in *Crassen v. Swoveland*, said: "But it is claimed that as it was found that Swoveland was in possession of the land at the time that Whitney purchased it, this was constructive notice. As a general proposition, the doctrine that possession of real estate is constructive notice to all the world of the rights of the par-

ties in possession is conceded. But the doctrine has no application to the case before us. * * * Our statute on the subject of registry * * * requires actual notice to defeat a purchaser where the defeasance has not been duly recorded. Possession has never been held anything more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: 'Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him which is not recorded.' 1 Wash. on Real Prop., p. 495, Sec. 22." 22 Ind. 434.

Hilliard, in his work on Vendors says: "In case of an unrecorded prior conveyance, it has been sometimes held, that the possession of the grantee is of itself constructive notice, equivalent to that derived from registration. But the prevailing doctrine is now otherwise. Thus, it is said, 'the doctrine in the English law of constructive notice of the title of the lessee or party in the possession, is not favored in the American courts.' So, Judge Story says: 'The American courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form. The English cases admonish courts of equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all English cases on this subject, except with a cautious attention to a just application to the circumstances of our country, and to the structure of our laws.'" Hilliard on Vendors, 411; *Scott v. Gallagher*, 14 Serg. & R. 333.

Story says, in speaking of the Registry Acts, that: "The object of all acts of this sort is to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances." 1 Story Eq. Jur., Sec. 397.

In *Van Keuren v. C. R. R. Co.*, the court, without reference to any statute, after announcing the general rule that possession of land is notice to a purchaser of the possessory title, say: "But this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed.

"So far as the purchaser is concerned, the vendor's deed is

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conclusive upon that subject; having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired.

"The well settled rule applies to this case, that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." 38 N. J. L. 167.

Upon a review of the whole case, I am of opinion that in the absence of actual notice of the agreement between Brophy and Sullivan, that Tagliabue and respondent had the right to rely and act upon the averments made by Brophy in his deed to Sullivan, that his conveyance of the title was absolute, and having thereby divested himself of all title and right of possession, that he continued in possession in subordination to the title of his vendee, and that they are entitled to protection as *bona fide* purchasers for value.

The judgment of the district court is affirmed.

LEONARD, J., concurring.

In my opinion it is unnecessary to decide, in this case, how evidence of open, notorious, exclusive possession by Brophy, at the time of Tagliabue's purchase, would have affected plaintiff's case; and I express no opinion as to whether proof of such possession would, or would not, be evidence of implied notice of the equities claimed by defendant. It is enough to say that it is not necessarily true from the allegations in the complaint, that such was the character of Brophy's possession at the time Tagliabue received his deed from Sullivan, and paid the purchase money; and there was no evidence that Brophy's acts at that time, and for a long time prior thereto, were at all inconsistent with what, from the record, appeared to be the truth; that is, that Sullivan was the sole owner. From all the authorities, Tagliabue had a right to believe that Sullivan was such owner, and to act upon that belief, unless Brophy's possession was so open, notorious, and exclusive as to amount to implied notice of his equities. Tagliabue swore that at the time of the purchase, and when he received the deed and paid the purchase money, he had no

knowledge or notice of Brophy's claim, and that he believed he was obtaining a perfect title. It nowhere appears that he was not justified, as a reasonably careful business man, to so believe. See *Havens v. Dale*, 18 Cal. 366; *Bell v. Twilight*, 2 Fost. (N. H.) 518; *Hewes v. Wiswell*, 8 Greenl. 97; *Hill on Vend.* 410.

As modified above, I concur in the opinion of Mr. Justice Hawley.

BEATTY, C. J.—I concur.

1. Ditch sale securing debt construed as mortgage: *Kidd v. Teeple*, 22 Cal. 255. The same as to sale and contract: *Pioneer Co. v. Baker*, 2 West C. R. 383.

2. Subsequently constructed ditch, held to pass, on foreclosure: *Hungarian Co. v. Moses*, 58 Cal. 168.

3. Right of mortgagee in possession to open mines: *Millett v. Darey*, 31 Beav. 470.

4. Right of mortgagor in possession to remove fixtures erected by him: *Moore v. Valentine*, 6 M. R. 112.

5. Refusal of mortgagees in possession of a colliery to furnish accounts to mortgagors, except on being paid the expense of so doing: *Norton v. Cooper*, 5 DeG. M. & G. 728.

6. Upon the facts of the case a motion to appoint a receiver and exclude mortgagor from interference in mines, denied: *Rouse v. Wood*, 2 Jac. & W. 553; 1 Id. 315.

7. Arrears due upon shares at the time of a transfer to a mortgagee made with the sanction of the company, in violation of a rule forbidding the transfer of shares till all arrears are paid, can not be collected from the mortgagee: *Watson v. Eales*, 23 Beav. 294.

8. Priority of unrecorded mortgage over subsequent mortgage given to secure antecedent debt: *Bybee v. Hawsett*, 12 Fed. 649; *Post PARTNERSHIP*.

9. Mortgage upon ores secured by mistake of scrivener need not be relinquished until the debt is paid: *Ames v. New Jersey Franklinite Co.*, 10 M. R. 434.

10. A deed of trust having been executed and lost in the mail, a duplicate may be executed and is valid: *Bassett v. Monte Christo Co.*, 4 M. R. 108.

11. A vote of the trustees of a corporation authorizing the president and secretary to borrow money and to mortgage the corporate property does not authorize the president to execute a note and mortgage to a firm of which he is a member: *Davis v. Rock Creek Co.*, 55 Cal. 359.

12. The mortgagee of a mining claim who afterward assigns his interest in the debt has not such an interest as can be reached by a judgment creditor against him, even though the mortgage is redelivered to him by his assignee for the purpose of collecting the debt: *Hall v. Redding*, 13 Cal. 215.

13. Distinction between mortgage and conditional sale: *Hickox v. Lowe*, 10 Cal. 197.

14. In a foreclosure suit in which the several lien claimants are made parties the court should determine the relative rights of plaintiff and the lien holders: *Johnson v. Badger Co.*, 3 M. R. 386.

15. An instrument signed by the president and directors of a corporation with a scrawl opposite each name, purporting to mortgage the corporate property is inoperative so far as the corporation is concerned: *Richardson v. Scott Co.*, 22 Cal. 150.

16. Irregularity in sale under foreclosure held to be waived by failure for nine years to redeem: *Rigny v. Small*, 8 M. R. 217.

17. Lien of co-tenant for outlay for improvements held to be prior to claim of mortgagee for debt of one of two tenants in common: *Stenger v. Edwards*, 9 M. R. 368.

18. Chattel mortgage upon steam engine and boiler afterward attached to a quartz mill upheld against a mortgage upon the quartz mill executed before the engine and boiler were affixed: *Tibbetts v. Moore*, 9 M. R. 348.

19. Mortgagee in possession held responsible for coal taken by adjacent owners encroaching on the mortgaged lands, he being bound to keep the pledge intact: *Hood v. Easton*, 2 Giff. 692.

20. Defense, in suit to foreclose mortgage on one of several tracts, that fraud existed in the sale of another of the tracts, held good: *Hicks v. Jennings*, 7 M. R. 138.

21. Power of corporation to mortgage: *Union Co. v. Murphy's Flat Co.*, 3 M. R. 487. Mortgage by the stockholders upheld in equity: *Bundy v. Iron Co.*, 38 Ohio St. 300.

OFFERMAN V. STARR.

(2 Pennsylvania State, 394; 44 Am. Dec. 211. Supreme Court, 1845.)

¹ **Lease distinguished from license.** An instrument using the terms "hath demised, leased and let * * * the right to mine and take away coal from the Salem vein" is a lease and not a license. A right to use a mine necessarily implies a right to possess it. The instrument is not impaired as a lease by the use of the words "right to mine," etc.; a grant of use and possession is the consideration for something to be rendered and constitutes a lease of the thing to be possessed.

² **Lessor not liable for surface injuries resulting from negligence of lessee.** The defendants demised a coal mine with the usual covenants, reserving, amongst other things, the right to view and examine the mine, and to re-enter for non-payment, neglect, etc. During the term, plaintiff's house, built on the surface over the mine, was injured from negligent working of the mine: *Held*, that the lessors were not liable for the results of their tenants' negligence.

Idem, as to licensor. There would be no difference in regard to the responsibility of defendants if the instrument were a license in terms.

This was an action on the case against Offerman, Biddle and Patterson, for negligently working their mine, and thus injuring the house of plaintiff. The title deeds were not in the bill of exceptions, but the declaration averred a possession of a coal mine in the land on which plaintiff's house stands. The only question raised in the case was, whether defendants were liable for the injury. In 1837, before the damage was done, the defendants demised to one Lewis, for a term of fourteen years, the right to mine and take coal within certain limits particularly described; in consideration of which the tenant covenanted to sink a shaft, erect a railway, steam engine, etc., for which an allowance was to be made out of the first rent falling due. He also covenanted to mine in a proper manner, and to prop and secure the mines sufficiently. Rent was to be paid at so much per ton taken away, and the lessors reserved the right by themselves or their agents to examine said mines at any time they might think proper; and on refusal to furnish statements of the coal taken away, or to pay rents, or permitting water to remain in the mines, or neglect or abandonment,

¹ *Boone v. Stover*, 9 M. R. 326.

² *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273.

etc., the lessors reserved a right of re-entry. It appeared that plaintiff's house was cracked, and the jury on the evidence found it was occasioned by the working of the mine below by the tenant. Whether the defendants, notwithstanding the demise, were liable, was the question which was decided affirmatively by the court below.

PARRY, for plaintiff in error.

LAESER and GREENOUGH, for defendants.

GIBBON, C. J.

The principal question was fully discussed and well decided in *Earle v. Hall*, 2 Metcalf, 353, and nothing is contested here except its application to the matter in hand. It is conceded that if the defendant's agreement with Hill is a lease, the maxim of *respondeat superior* is inapplicable to it; but it is contended that the thing granted is not the mine, but a license to work it. The words are: "The said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid and performed on the part of the said party of the second part, hath demised, leased, and let unto the said party of the second part, the *right* to mine and take away coal from the Salem vein, etc.; and a distinction is attempted between a grant of license to work a mine, and a grant of the mine itself; which however, if a distinction at all, is a very thin one. A right to use a mine necessarily implies a right to possess it, and a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a lease of the thing to be possessed. But what would have been the difference had it been a license in terms? *Respondeat superior* is inapplicable to an owner of land for acts of negligence in a business not conducted by him and for his account. What had these defendants to do with the direction of the business or the coal when it was mined? Lewis covenanted to sink the slope, erect the engine, to take out a certain number of tons each year, according to the most approved method of mining, and carry it to the landing; and to pay a certain sum per ton for it. So far the defendants

had nothing to do with the business but to receive their rent. But they reserved a right to visit and examine the manner in which the business should be carried on in the mine; and to resume the possession should the tenant refuse to furnish statements of the amount taken out or pay the rent. These clauses do not constitute a reservation of the possession or a right to interfere with the direction of the business.

The right of visit was to enable them to see whether the tenant was performing his engagements, in order to found process against him if he were breaking them; and the right to resume the possession was to put an end to the business altogether. The lease was analogous in all respects to the lease of a farm with a clause of re-entry for bad farming or non-payment of rent. On no principle, then, could the acts of Lewis be imputed to his lessors.

Judgment reversed.

BOSWELL ET AL. V. LAIRD ET AL.

(8 California, 469. Supreme Court, 1857.)

¹ Accident from reservoir in hands of contractor. Where parties employed architects, reputed to be skillful, to construct a dam of certain specified dimensions capable of resisting all floods and freshets for the period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water rushed down the channel, destroying, in its course, the store of plaintiffs, and the employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work: *Held*, that the contractors alone were liable.

Idem—Respondent superior, when not to apply. The relation of the parties is that of independent contractors; the relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondent superior* does not apply to the case.

Liability of architect—Defects inherent in the plan or otherwise. The architects alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan. If the plan had been devised by the owners, and the builders simply engaged to carry it out, and the defects from which

¹ *Cuff v. Newark R. R.*, 35 N. J. L. 17; 10 Am. R. 205; *King v. N. Y. R. R.*, 66 N. Y. 181; 23 Am. R. 37; see *Lake Superior Co. v. Erickson*, 10 M. R. 40.

the injuries resulted had been inherent in the plan, then the former would have been liable to plaintiffs.

Right of selection necessary to fix liability. The right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows.

Employer liable after acceptance of work. After the acceptance of the work, or construction, by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency, and the liability of the contractor ceases.

Proprietor not liable because accident happened on his premises. Where the enterprise undertaken is a lawful one, and is intrusted to competent and skillful architects, the mere fact that the improvements are erected upon the land of the proprietor is no just reason why liability should attach to him, during its progress, any more than if such enterprise be executed elsewhere.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

In June, 1856, the defendants Laird and Chambers contracted with their co-defendants Moore and Foss, the latter being architects of reputed skill and experience, for the construction of a dam forty feet in height, on Deer creek, at a point several miles above the city of Nevada. The design of this dam was to force an accumulation of the waters of said creek, at that point, so as to fill a basin of about one hundred acres, immediately above the dam, with water, that could be used for mining purposes during the summer season.

Under the contract, Moore and Foss bound themselves to construct across said stream, at their own expense of money, material and labor, a dam or embankment, forty feet high, of substantial material and skillful workmanship, capable of resisting all floods and freshets, for the period of two years from its completion, and to deliver the same to defendants Laird and Chambers, complete, on or before a given time, guaranteeing it to withstand the floods and freshets for such period from its completion.

Laird and Chambers bound themselves to pay Moore and Foss certain sums of money, as the work progressed, and upon the completion of the dam, according to the stipulation, to accept and receive the same, and pay them the balance due under the contract.

¹ *Gorham v. Gross*, 125 Mass. 232; 28 Am. R. 224.

Moore and Foss commenced work on the dam in July, 1856, ceased for a short time, re-commenced in October, 1856, and from that time continued, according to their own model and plan, to construct the dam.

On the 15th of February, 1857, before the work was wholly completed, and before it had been accepted by Laird and Chambers, it was carried away by a sudden storm and freshet.

The plaintiffs in this cause, Boswell and Hanson, were merchants in the city of Nevada, and had in the month of September, 1856, erected a store on the margin of Deer creek, and put therein a large stock of goods.

When the dam, on the 15th of February, 1857, broke away, a great volume of water was loosened in the channel of the creek, and sweeping down in a torrent, the waters carried away and destroyed the building, store and stock of goods belonging to plaintiffs. The testimony showed that Laird and Chambers had not been at the dam from the day of the commencement, until after the breakage; that they prescribed no plan for its construction, furnished no materials, neither employed nor directed any hand engaged upon the work, nor took any part in, or control over the same; had not received the work from the contractors, nor had Moore and Foss completed the work, nor delivered or tendered the same to Laird and Chambers, at any time before the injury to plaintiffs occurred.

It further appeared, on the trial, that about fifteen hours before the dam gave way, word was sent to the plaintiffs of the anticipated danger, and that no attention was paid to the warning. On the conclusion of plaintiff's testimony, counsel for defendants Laird and Chambers, moved the court below for a non-suit as to them, which motion the court overruled, and defendants Laird and Chambers excepted.

After the evidence was finished, the court was asked by defendants, among others, to give the following instructions to the jury—which, being refused, the defendants Laird and Chambers excepted:

“Where one or more persons engage for the construction of a work or dam, with contractors to whom are given the entire control of the work, the selection of the mode and model, and the choice and employment of the hands assisting,

such person or persons so engaging are not responsible in law for damages resulting from the negligence or unskillfulness of such contractors, or of any of their hands about such work. And if, from the evidence, the jury believe that under the contract between Laird and Chambers, of the one side, and Moore and Foss, of the other, for the construction of the dam across Deer creek, Moore and Foss acted under an independent employment, had the sole control of the work, and the manner of its building, the employment and management of the hands engaged thereon, and that Laird and Chambers had not received the dam from such contractors before it broke, the jury will find for the defendants, Laird and Chambers.

"Where one or more persons engage for the construction of a work, with contractors to whom are intrusted the sole and entire direction and control of the work, as well as the employment and management of all assistants, the relation of principal and agent, or master and servant, does not exist between such persons and such contractors, and such persons are not responsible for any negligence or unskillfulness of such contractors, or those employed by them."

The court, at the request of plaintiffs, among others, gave to the jury the following instruction, under the exceptions of Laird and Chambers' counsel: "That if the defendants Laird and Chambers employed the defendants Moore and Moss to construct the dam referred to in the pleadings and evidence in this cause at the point where the same was erected, and such dam gave away and broke by reason of its unskillful construction, and an injury resulted therefrom to plaintiffs, that then defendants Laird and Chambers are liable in this suit."

The jury found a verdict for plaintiffs, of five thousand dollars, on which judgment was rendered against all the defendants, who moved for a new trial; which, being denied, they appealed.

H. MEREDITH, for appellants.

McCONNELL & NILES and A. A. SARGENT, for respondents.

FIELD, J., delivered the opinion of the court, TERRY, C. J., concurring.

The only question necessary to consider for the determination of the appeal in this case, arises upon the refusal of the court below to give certain instructions as to the liability of the defendants Laird and Chambers.

The action is brought to recover damages sustained by the plaintiffs, in consequence of the breaking of a dam or embankment constructed across Deer creek, in Nevada county, by the defendants Moore and Foss, under a contract with the defendants Laird and Chambers. It appears from the evidence introduced on the trial, that in June, 1856, the defendants Moore and Foss entered into a contract with Laird and Chambers, by which, in consideration of the payment by the latter of certain moneys in the progress of the work, and the balance upon its completion, Moore and Foss bound themselves to construct at a designated point on the creek, a dam or embankment, of certain specified dimensions, with good and substantial materials in a workmanlike manner, and capable of resisting all floods and freshets of the stream, for a period of two years, and to deliver it completed by a given time. The construction was commenced in pursuance of the contract, in July or August, 1856, and with the exception of an interval of some weeks in September and October, was progressed in, until February 14, 1857, when, being still incomplete, it was broken by a sudden freshet, and a large volume of water detained by the embankment, being thus loosened, rushed down the channel of the stream, carrying away and destroying, in its course, the store of the plaintiffs, with their stock of merchandise.

The defendants Moore and Foss are architects, and were at the time of the contract reputed to be experienced and skillful in their profession; and from the commencement of the work up to and including the time of the breakage, they had exclusive control over its construction. The defendants Laird and Chambers exercised no superintendence, gave no directions, furnished no materials, employed no hands, and although the time within which, by the contract, the work was to be completed had passed, they had never signified any willingness to waive the objection as to the time, and accept the same when completed.

On the conclusion of the testimony, the defendants' counsel requested the court to give among others, two instructions,

which amounted in substance to this : that if the jury believed in the construction of the dam under the contract, Moore and Foss acted under an independent employment, had the sole control of the work, and the manner of its building, the employment and management of the hands engaged thereon ; and that Laird and Chambers had not received the dam from such contractors before it broke, and that the injury complained of occurred through the negligence and unskillfulness of Moore and Foss and their employes, the jury would find for the defendants Laird and Chambers. The court refused the instructions, and at the request of the plaintiffs, charged the jury : "That if the defendants Laird and Chambers, employed the defendants Moore and Foss, to construct the dam referred to in the pleadings and evidence in this cause, at the point where the same was erected, and such dam gave way and broke, by reason of its unskillful construction, and an injury resulted therefrom to plaintiffs, then that the defendants Laird and Chambers are liable in this action."

The court below thus placed the liability of Laird and Chambers, for the injuries sustained, solely upon the fact that they contracted for the construction of the work, and held that this liability was not affected by the fact that they exercised no control or supervision over the work during its progress, or that Moore and Foss were independent contractors, to whose skill and judgment the construction of the work was entirely intrusted.

To determine the propriety of the instructions, given and refused, it will be necessary to consider the principles upon which responsibility could attach to Laird and Chambers, and their application to the facts of this case. If liability exists on their part, it must arise either from their relation to the parties engaged in the erection of the structure, or from the character of the structure itself, independent of its construction.

The relation between parties to which responsibility attaches to one, for the acts or negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound

to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior, upon the principle *qui facit per alium facit per se*. To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury, be in fact that of superior and subordinate, or master and servant. "Unless the relation of master and servant exist between them," said Coleridge, J., in *Milligan v. Wedge*, "the act of one creates no liability in the other." 12 Adol. & El. 737. "The rule of *respondeat superior*," said the Court of Appeals of New York, in *Blake v. Ferris*, "as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation, wherever it exists, whether between principal and agent, or master and servant, and to the subjects to which that relation extends, and is co-extensive with it and ceases when the relation itself ceases to exist." 1 Seld. 48.

By applying the test thus laid down to the relation existing between Laird and Chambers on the one hand, and Moore and Foss on the other, the question of liability will be easily solved. The relation between them wants one of the most essential features of the relation between master and servant. Something more than the mere right of selection on the part of the principal, is essential to that relation. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case that power was wanting, and, of course, the relation to which it was essential did not exist. Laird and Chambers conceived the project of constructing a dam across a mountain stream, and applied to architects by profession, of reputed skill and experience, to carry the project into execution. A dam capable of effecting a certain result was contracted for; the mode of construction, the selection of materials, and the employment of hands, were all intrusted to contractors, who, from their profession, were supposed to be much better qualified to judge of such matters than Laird and Chambers themselves. The relation between the parties was that of independent contractors; Laird and Chambers, on the one hand, contracting for a dam of certain dimensions and strength; and Moore and Foss, on the other hand, contracting to construct and deliver

such dam within a specified time, for a stipulated sum. To this relation the doctrine of *respondet superior* does not apply, as will be perceived by an examination of the recent decisions of the English and American courts. In *Rapson v. Cubitt*, 9 M. & W. 710, the defendant, a builder, was employed by the committee of a club, to make certain alterations at the club-house, including the preparation and fixing of gas fittings, and he made a contract with one Bland, a gas-fitter, to perform this part of the work in the performance of which, through the negligence of Bland, the gas-exploded and injured the plaintiff; and the court held that the defendant was not liable. Lord Abinger, C. B., said: "The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him; and to him the plaintiff must look for redress." And Parke, B., said: "I am of the same opinion. The plaintiff has his remedy against Bland, whose negligence was the cause of the injury; if he attempts to go further, and to fix the defendant, it can only be on the ground of Bland's being the servant of the defendant; but then the obvious answer is, that Bland was only a sub-contractor, to do certain of the work, and that the relation of servant and master did not subsist between him and the defendant." In *Burgess v. Gray*, 1 C. B. 578, the defendant was proprietor of premises adjoining the highway, and employed one Palmer to construct a drain to communicate with the common sewer. Palmer employed workmen, who, in the performance of the work, placed a heap of gravel on the highway, in consequence of which the plaintiff in driving along the road was thrown from his cart, and sustained the injury for which the suit was brought. It was in evidence that Palmer had the entire control and management of the work, and employed workmen whom he paid, and charged the defendant with the amounts paid; that the defendant had applied to the commissioners for leave to break into the sewer, and that the dangerous condition of the heap was pointed out to him by a policeman before the accident occurred, when he promised to remove it. The plaintiff obtained a verdict and the defendant a rule *nisi* to enter a non-suit; in deciding which, Tindal, C. J., said: "If, indeed, this had been the simple case of a contract entered into

between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done ;” but on the ground that the evidence showed that the soil had been placed on the road with the defendant’s consent, if not by his express direction, he was of opinion that the verdict should stand ; and Coltman, J., said : “ I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer,” and the rule was discharged. In *Hobbitt v. The London and Northwestern Railway*, 4 Exch. 254, workmen employed by the defendants in constructing a bridge over a public highway caused the death of a person passing beneath, by negligently allowing a stone to fall upon him, and it was held that the company was not liable in an action by the administratrix of the deceased. In rendering the judgment of the court, Baron Rolfe said : “ The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, ‘ *qui facit per alium facit per se.*’ The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care of the person employed ; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.”

In *Knight v. Fox*, 5 Exch. 721, a railway company had contracted with A to construct a portion of their line ; A contracted with B to erect a bridge on the line ; B contracted with one Cockrane, to erect for a specified sum, a scaffold which had become necessary in the construction of the bridge, and to furnish the requisite materials, lamps and other lights. In the erection of the scaffold, a portion was improperly projected upon the foot-path, owing to which, and the want of sufficient light, D fell over it at night and was injured ; and

it was held that an action could not be maintained by D against B, for the injury thus occasioned, and the plaintiff was non-suited. On the rule to show cause why the non-suit should not be set aside, Baron Parke held, the rule should be discharged, and said the case was "precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work." Baron Alderson was of the same opinion, and said: "That when that negligent act was occasioned by Cockrane, he was acting in the character of a sub-contractor, and that he did the work on his own individual account. The defendants took no part in the matter. The plaintiff's remedy was against Cockrane," and so the rule was discharged. In *Peachy v. Rowland*, 16 Eng. L. and E. 443, the defendants contracted with A to fill in the earth over a drain which was constructed for them across a portion of the highway, from their house to the common sewer. A having filled the drain, left the earth so heaped up above the level of the highway, as to constitute a public nuisance, in consequence of which the plaintiff in driving along the road, sustained personal injury, for which he brought his action. A few days previous to the accident, and before the completion of the work, one of the defendants had seen the earth heaped up on a portion of the drain, but there was no evidence that either of the defendants had interfered with, or exercised any control over the work, and the court held that there was no evidence to go to the jury of the defendant's liability. The principle to be extracted from this decision is, that if a party be employed to do a lawful act, and in doing it he commit a public nuisance, his employer is not liable.

The decisions of the New York courts are to the same effect, and express, with equal clearness, the distinction between the liability of an employer, when the relation between him and the employed is that of master and servant, and when it is that of independent contractors. In *Blake v. Ferris*, 5 N. Y. 48, the defendants had obtained permission from the authorities of the city of New York to construct a sewer, at their own expense, in a street of the city. One Butler was appointed by the street commissioner, an inspector of the work, and, as such, had charge of the sewer. He contracted with one Gibbons to furnish all the materials, and build the sewer in ques-

tion according to the specifications of the street commissioner, and to provide proper guards and lights, at the excavation of the drain, for the prevention of accidents. In consequence of the negligent manner in which the sewer, while yet unfinished, was left open and unguarded in the night, the plaintiff's horses and carriage were driven into it, and for the injuries thereby occasioned, the suit was brought. Upon the close of the case, the defendant requested the court to instruct the jury, in substance, that if the contractor, who was engaged in constructing the sewer when the accident happened, was exercising an independent employment, and the defendants did not interfere with the work, they were not liable; but the court refused the instruction, and the plaintiff had judgment, and the case went to the Court of Appeals, where the judgment was reversed. In its opinion the court said:

“When a man is employed in doing a job, or piece of work, with his own means, and his own men, and employs others to help him, or to execute the work for him, and under his control, he is the superior, who is responsible for their conduct, no matter whom he is doing the work for. To attempt to make the primary principal, or employer, responsible in such cases, would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded.”

In *Pack v. The Mayor of New York*, 8 N. Y. 222, the defendants had entered into a contract with one Foster to grade Bloomingdale road, and furnish materials for the same, in accordance with certain specifications. Foster made a contract with one Riley to do all the blasting of rocks required. In blasting, several fragments of rock were thrown into the house of the plaintiff, producing injury to his family and property; and it was held by the court that the contractor Foster was not the agent or servant of the corporation, and that the city was not, in consequence, liable.

JEWETT, J., in delivering the opinion of the court, said:

“The doctrine is that a person who undertakes the erection of a building, or other work for his own benefit is not responsible for injuries to third persons, occasioned by the negligence of a person, or his servant, who is actually engaged in execut-

ing the whole work under an independent employment, or a general contract for that purpose. . Foster was such a contractor, actually engaged in performing his contract for the entire job, for whose negligence, or that of his servants, the defendants are not liable."

In *Kelly v. The Mayor of New York*, 1 Kern. 432, it was held that the corporation, which had contracted with a person to grade a street, was not liable for damages occasioned by the negligence of the workmen employed by the contractor in performing the work. In that case, whilst the plaintiff was riding in the street, his horse was injured by the careless blasting of one of the workmen. The cases of *Blak v. Ferris* and *Puck v. The Mayor of New York*, were cited as authority, and in referring to a clause in the contract that the work was to be done under the direction, and to the satisfaction, of certain officers of the corporation, the court said :

"The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen, will not be denied. This right of selection lies at the foundation of the responsibility of a master, or principal, for the acts of his servant or agent. * * * As a general rule, certainly no one can be held responsible as principal who has not the right to choose the agent from whose act the injury follows."

The doctrine laid down in this opinion as to the liability of Laird and Chambers is abundantly sustained by the authorities above cited. Their liability, so far as the injury complained of arose from the negligent and unskillful erection of the dam depends upon the question whether the relation between them and Moore and Foss was such as to authorize a supervision and control in the execution of the work. If it authorized such supervision and control—if, in other words, it was that of master and servant, they are liable. If, on the other hand, Moore and Foss, under the contract, were engaged in an independent employment in the construction of a work which was intrusted entirely to their skill, and over which no supervision and control were exercised by Laird and Chambers, the relation of master and servant did not exist, and the liability belonging to that relation did not attach. The instructions asked by the defendants' counsel were proper, and should have been

given, unless a liability existed from the nature of the structure itself, independent of its manner of construction.

If the injury complained of arose, not from the manner in which the embankment or dam was constructed, but from the fact that it was constructed at all—that is, if it was a structure amounting to a nuisance, liability therefor would attach equally to Laird and Chambers and the contractors, Moore and Foss. The authorities limit the liability to cases where structures amounting to nuisances are erected on or near and in respect to fixed property of the owner, and place the liability on the ground that every man is bound to so use and manage his own property as not to injure others. When the structure is erected by the permission of the owner, there is reason in limiting the liability to cases where the nuisance is placed on or near, and in respect to his own property; but where it is erected by his express direction, we can perceive no reason for the limitation. It is not the structure itself, but its character as a nuisance, that causes the injury and creates the liability.

In *Bush v. Steinman*, 1 Bos. & P. 402, the defendant had purchased a house by the road-side, and contracted with a surveyor to repair it for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a brick-layer under him, who contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was placed in the road. The plaintiff and his wife, riding in a chaise, were overturned and injured by the heap of lime, and they brought their action against the defendant, and took a verdict, with liberty to the defendant to move for a non-suit. In the decision of the motion, Chief Justice Eyre concurred with his associates in sustaining the verdict, but at the same time said: "I am ready to confess that I find great difficulty in stating with accuracy, the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. * * * Where a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious, and the person injured should have only to

discover the owner of the house which was the occasion of the mischief; not to be compelled to enter into the concerns between the owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from circuity of action. Upon the whole case, therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my brothers."

Heath, J., founded his opinion on the fact that all the sub-contracting parties were in the employ of the defendant. "It has been," he said, "strongly urged that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant. But no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further."

Brook, J., placed his concurrence with Mr. Justice Heath on the ground that "he who has work going on for his benefit and on his own premises, must be answerable for the acts of those he employs."

In *Laugher v. Pointer*, 5 Barn. & C. 579, the defendant, who was owner of a carriage, hired a pair of horses to draw it, for a day, from a stable-keeper, who provided the driver, through whose negligent driving an injury was done to the horse of the plaintiff. The court were divided as to the defendant's liability. Littledale, J., in giving his opinion, commented upon the cases of *Bush v. Steinman* and *Sly v. Edgley*, 6 Esp., in which last case Lord Ellenborough followed, at *nisi prius*, the authority of *Bush v. Steinman*, and drew a distinction between the liability of a party for injuries resulting from the use of hired property, and injuries arising from the use and occupation of real estate. "And the rule of law may be," he said, "that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or contractors, or their servants. The injuries done upon land, or buildings, are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises.

The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. * * * But admitting these cases, the same principle does not apply to personal movable chattels, or to the permanent use and enjoyment of land or houses. * * * The use of personal chattels is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employment, and the mere possession of that, when the care and direction of it is intrusted to such persons who exercise public employment, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable." And Chief Justice Abbot, in the same case, said: "Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another."

In *Quarman v. Burnett*, decided in 1840, 6 Exch. 499, Baron Parke, in delivering the opinion of the court, drew the same distinction; but in *Reedie v. The London Northwestern Railway*, decided in 1840, 4 Welsb. H. & G. 254, the Court of Exchequer held there was no such distinction, except in cases where the acts complained of amount to a nuisance. In this case, the counsel for the plaintiff argued that there was a recognized distinction between injuries arising from the careless or unskillful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed and real property; but Baron Rolfe, in delivering the opinion of the court, after alluding to the distinction noticed by Littendale, J., in *Laugher v. Pointer*, said: "But on full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases when the act complained of is such as to amount to a nuisance; and, in fact, that according to the modern decisions, *Bush v. Steinman*, must be taken not to be the law, or, at all events, that it can not be supported on the ground on which the judgment of the court proceeded. * * * It remains only to be observed that in none of the modern cases has the alleged distinction between

real and personal property been admitted. In *Milligan v. Wedge*, Lord Denman expresses doubt as to the existence of such a distinction, in any case; and in the more recent case of *Allen v. Haywood*, the judgment of the court proceeded expressly on the ground that the contractor in a case like the present, is the only party responsible."

The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction as to the liability of a party when he engages a contractor to erect structures on his own premises, and when he engages such contractor to erect them on the premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be intrusted to competent and skillful architects, there is no just reason why liability should attach to the projector, for injuries occurring in its progress, any more if such enterprise be executed on his own land than if executed elsewhere. If a man, wishing to build a house for his own use, upon his own premises, lets it out by contract to an architect, who is to provide all materials and deliver it completed, upon no just principles should his liability be greater than if he undertook the building of a similar house upon his neighbor's property, and let it out by contract in the same way. If the structure amount to a nuisance—if the injury complained of arises, not from its negligent or unskillful construction, but from the fact that it is constructed at all—then liability would attach, whether the erection be made under his own supervision and control, or let out by contract to others. To illustrate this position—if the owner of land erect a dam, or permit a dam to be erected, across a stream running through his property, by which his neighbor's land is flooded, he is liable for damages; for the injury results, not from the manner in which the dam is erected, but from the fact that it is erected at all. He has used, or permitted his property to be used, to the injury of others, and must be responsible. But if no injury follows from the dam itself, and its construction is let out by contract, there is no reason why the owner should be responsible for injuries arising from the negligence or unskillfulness of the contractors during the progress of the work, from the fact that it is a structure upon his own land, if such liability would not attach to him if the structure were on the land of another.

We have examined the authorities in the Massachusetts Reports, cited by the learned counsel of plaintiff in his very able brief, and also the case of *Bailey v. The Mayor of New York*, in 3 Hill 531 and 2 Den. 433. The Massachusetts cases follow the older English decisions, and in *Lowell v. Boston Corporation*, 23 Pick. 24, the court cite *Bush v. Steinman*, with approbation, and say, "this decision is fully supported by the authorities cited, and well established principles." The question involved in the case at bar does not appear to have been discussed in Massachusetts in the light of recent English decisions.

In the case in 3 Hill, and 2 Den., the corporation of New York was held responsible for injuries occasioned by the negligent and unskillful construction of a dam on the Croton river, which was a part of the works built for supplying the city with pure water. In that case it would appear that the dam had been completed and accepted by the corporation. By its acceptance and subsequent use, the corporation assumed the responsibility of the work, and virtually guaranteed its strength and capability to protect against injuries. To third parties it then became liable, and although the chancellor in his opinion does not mention in terms the acceptance of the dam, yet this fact must have had a controlling influence on his judgment, for he places the liability of the city expressly on the ground that *the dam* was the *property* of the corporation, and that the corporation was bound to see that it was not used by any one so as to become noxious to the occupiers of property on the river below; and concluded by saying, "and upon that ground, though I confess with some hesitation, I shall assent to the affirmance of the judgment of the court below." In *Blake v. Ferris*, already cited, which was decided nearly six years after the case of *Bailey v. The Mayor of New York*, the court, in reference to *Bush v. Steinman*, observes that it was followed by Lord Ellenborough at *nisi prius* in the case of *Sly v. Edgley*, 6 Esp. 6, but was believed never to have received the sanction of an English court. In *Laugher v. Pointer*, its authority in reference to the case before the court was denied, and the correctness of the principle on which it was founded doubted by Littendale, J., and in *Quarman v. Burnett*, and *Rapson v. Tubitt*, it was held in-

applicable to those cases, and in *Reedie v. The North Western Railway* it was held not to be law, or at all events that it could not be supported on the ground in which the judgment proceeded, and the court concludes its opinion by stating that upon examination it appeared that the main proposition of that case was not law in England or in New York.

The recent decisions of Eng'land and of New York appeared to us to be sustained by sound reasoning, and to place the liabilities of parties upon just principles; and we only advance one step further in the same direction, following the same reasoning, in holding, as we do, that the liability of Laird and Chambers is not affected by the question whether they were the owners or not of the land where the dam in question was located.

For injuries occurring in the progress of the work before its completion and acceptance, the contractors alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the mode and manner which constituted the defect by which the injuries complained of were occasioned, had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were simply engaged to carry out, then liability would attach to Laird and Chambers for injuries occurring in its progress, as well as afterward. But this is not pretended. If the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by Laird and Chambers, there can be no doubt of the liability of the latter. Parties for whom work contracted for is undertaken, must see to it before acceptance, that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased and their own commenced. In the present case the damages are, in fact, claimed for the negligence and unskillfulness of the work of the contractors before its completion and acceptance, and it is sought to fasten a liability

for such damages upon Laird and Chambers from the fact that it was in their mind that the undertaking originated, and it was their volition which set that undertaking into execution. If these reasons are sufficient to charge them, then upon the same principle no enterprise requiring for its execution the skill, learning and knowledge of professional men, could be undertaken, without risks on the part of the original projectors which no prudent man would take.

It follows that, as the case stands before this court upon the record, the liability of Laird and Chambers must depend upon the character of the relation between them and Moore and Foss, and the refusal of the instructions based upon that relation was error, for which a new trial must be had.

Judgment reversed, and cause remanded.

TUOLUMNE COUNTY WATER CO. V. COLUMBIA AND STANISLAUS WATER CO.

(10 California, 193. Supreme Court, 1858.)

Ditch flooding ditch—Sufficiency of complaint. Form of complaint in case of ditch flooded by another ditch given in full as sustained by the court of review.

A stockholder who has parted with his stock before suit brought is disinterested and therefore a competent witness for the company.

This was an action for damages, caused by the defence ditch breaking and overflowing the ditch of plaintiffs.

The complaint is as follows:

“District Court, Fifth Judicial District—The Tuolumne County Water Company v. The Columbia and Stanislaus R. Water Company—Tuolumne County: ss.—The Tuolumne County River Water Company, plaintiffs, by Henry P. Barber, their attorney, complain of the Columbia and Stanislaus River Water Company, defendants, both plaintiffs and defendants being corporations formed for the supply of water for mining purposes, under the laws of this State: That said

plaintiffs heretofore, to-wit, on the sixth day of May, A. D. 1857, at the county of Tuolumne, were the owners and proprietors of a certain valuable water-ditch or canal, for the purpose of conveying water; at which time and place said defendants were also the owners and proprietors of a certain other water-ditch and canal for the purpose aforesaid; and said plaintiffs aver that afterward, to-wit, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that the said ditch broke and gave way, and the water flowing therein, by reason thereof, flowed into, over, and upon the ditch of said plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stones, earth and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use, profit, and benefits of the water flowing therein, to said plaintiffs' damages of three thousand dollars, and thereof they bring suit."

The answer of defendants was a general denial.

On the trial, Thomas P. Morrissey, a witness for the plaintiff, being sworn on his *voir dire*, testified as follows:

"I was ditch-tender for plaintiffs, and a member of the corporation at the time of the breaking of defendants' ditch in May last. I sold out on or about the tenth of June, and before the commencement of this suit, to a former partner who is a stockholder, for three thousand dollars—three shares. I think I have his notes at my cabin. They will become due the last of this month. I have no other security. I have no interest in the event of this suit."

Defendants' counsel objected to the witness, on the ground of interest. The court overruled the same, and defendants then and there excepted.

The trial was had before a jury, who returned a verdict for the plaintiffs for the sum of \$1,550, and judgment was duly entered thereon. Defendants moved for a new trial, which was denied by the court, and defendants appealed.

J. W. COFFROTH, for appellants.

1. The complaint is insufficient to support the judgment, because there is no relief asked.

2. The court below erred in admitting the witness Morrissey to testify.

3. The damages are excessive.

BARBER, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

1. The complaint in this case is sufficient.

2. The witness Morrissey had no interest in the event of the suit, having ceased to be a stockholder before the suit was brought.

3. The damages were not excessive.

Judgment affirmed, with ten per cent. damages.

WOLF ET AL. V. ST. LOUIS INDEPENDENT WATER CO.

(10 California, 541. Supreme Court, 1858.)

¹The owner of a ditch is bound to use that care and caution in constructing and maintaining it, which an ordinarily prudent man would use if all the risk were his own.

²Negligence in such case a question of fact. The degree and fact of prudence must depend upon the particular circumstances of each case; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross, or even criminal, negligence.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action to recover damages, caused by the overflow of defendants' flume upon the mining claim of plaintiffs.

Plaintiffs owned and were working a mining claim; defendants constructed a flume for the conveyance of water across the claim of plaintiffs. On the night of the 24th of March, 1857, a heavy snow storm occurred, and filled up the defendants' flume, thus causing it to overflow upon the claim of

¹ *Todd v. Cochell* 10 M. R. 655; *Everett v. Hydraulic Co.*, 4 M. R. 589; *Campbell v. Bear River Co.*, 10 M. R. 656.

² As to when negligence is a question of fact, see 24 Fed. 850, note.

plaintiffs. A large quantity of water was precipitated on plaintiffs' claim, washing away pay-dirt, sluice-boxes, etc.

The cause was tried by the intervention of a jury. The principal question at issue was as to negligence on the part of defendants in the construction of the flume. The court instructed the jury on this point as follows:

"That, in the absence of any priority between the parties, the owner of a ditch is bound to use that degree of care and caution, in the constructing and maintaining his ditch, that a prudent man would use if all the risk were his own in case of the ditch breaking, and that if he does use such degree of caution, and if, by an unforeseen accident, which a prudent and careful man could not reasonably foresee, his ditch breaks, he is not liable. That this doctrine is so far modified in this State by the priority of parties, that if the ditch-owner is prior in point of time, he is only liable for gross carelessness; while on the other hand, if the ditch-owner is subsequent, in point of time, he is bound to use that caution which a *very prudent man* would use were the risk all his own, and that, in the present case, if the jury believe from the testimony that the plaintiffs' mining claims were located before the construction of defendants' ditch, and that the flume overflowed and injured plaintiffs' works, then it is for the jury to determine, from the testimony, whether or not the defendants have used the care and caution which very prudent men would have used, had both the ditch and claims been owned by them; and if they have, the jury should find for defendants. But if they have not used such care and caution, then the jury should find for plaintiffs, and assess such damages as are found to have been sustained."

To which instruction the defendants excepted. The jury returned a verdict for the plaintiffs, and assessed the damages at \$1,000. Defendants moved for a new trial, which was denied, and they appealed to this court.

McCONNELL and NILES, for appellants.

O. C. HALL, for respondents.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

In this case the complaint is for injury done mining claims situated below defendants' dam, and located prior to its construction. The error of the court is in holding the party to too strict a rule of prudence and care in the management and control of his own property. In *Hoffman v. Tuolumne Water Co.*, decided at this term (10 Cal. 413), we laid down the rule applicable to such cases. We there cited authorities from other States, which establish what we consider the correct measure of responsibility attaching to riparian owners. No distinction is made by those cases in the prudence to be exercised in the use or control of a dam, or any work of the like kind, when property, liable to be injured by its breaking, was situated at the time near by or distant; indeed this distinction could not well be, as in all cases in the old States, we presume, there is always, below dams erected over a stream, property exposed to injury by a sudden breach of them. Unquestionably, as the responsibility of the owner is for negligence committed by him to the injury of another, the question of negligence and the degrees of it must necessarily depend, in a great measure, upon surrounding facts, such as the existence and exposure of property below the dam, and the like. For it is obvious, that if there was no property to be injured, or but little, or a very remote and improbable chance of damage to other persons, no such precaution would be required as if valuable and important interests were likely to be affected by neglect or imprudence. But we see nothing in this to warrant the standard which the court below has adopted. A discreet man may be expected to exercise unusual vigilance, diligence and care in particular circumstances; and the law requires it of him. But the judge below goes further, and requires the owner, on the hypothetical state of facts assumed in his charge, to exercise not extraordinary prudence only, but that care and diligence which "a *very prudent* man" would take if the risk were all his own. We do not think that this is the proper standard. Besides being uncertain, and calculated to mislead the jury, it is positively erroneous; for, as we showed before, the law holds no man responsible for the ordinary prudent use of his own property—such use as men of common sense and prudence take of their own property when a failure to take it exposes them to a loss of it. This law of

social duty is founded upon the obligation to pay such respect to the rights of others as we pay to our own. And we think that it would be raising the standard of this obligation too high, to require every man to conform his conduct, in this regard, to the habits or acts of a particular class of men—the very prudent—instead of to the mass of them. One certain and uniform rule ought, in our judgment, to prevail in such cases, and the learned judge below has, in the first portion of the instruction, clearly stated it. It is to require that degree of diligence and prudence which men generally—or ordinarily prudent men—use in like instances when the risk is their own; and, as every case must depend in a great degree on its own circumstances, leaving the jury to determine whether, under the particular facts, that degree of prudence was exercised. Both the degree and fact of prudence must, of course, we repeat, depend upon the particular circumstances; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross, or even criminal negligence.

For the error indicated, the judgment must be reversed, and the cause remanded.

¹GRIFFITHS V. GIDLOW.

(3 Hurlstone & N. 648. Court of Exchequer, 1853.)

²**Injury from falling bucket—Presence of master—Working after knowledge of danger.** Plaintiff, a workman employed in sinking a pit, was injured by the fall of a tub filled with water. Evidence was given that the hoisting tackle was defective, not being fitted with a safe hook,

¹ The point in this case has been somewhat modified by later decisions. Remaining in employ after knowledge does not necessarily presume contributory negligence: *Snow v. Housatonic R'y*, 8 Allen, 441; *Greene v. Minn. R'y*, 31 Minn. 248; 47 Am. Rep. 785; *Laning v. N. Y. C. R. R.*, 49 N. Y. 521. He may remain after notice inducing confidence that defect will be remedied: Whart. Neg. § 221. Or where master has promised to remedy defect: *Holmes v. Clarke*, 6 H. & N. 249; *Clarke v. Holmes*, 7 Id. 937; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; 48 Am. Rep. 669. He may wait a reasonable time after notice for repairs: *Parody v. Chicago R'y*, 15 Fed. 205; *Hough v. Railway*, 100 U. S. 213. The citations of the case are collected in Thompson on Negligence, in the table of cases: 20 Mich. 127; 3 Dill. 325; 38 Pa. St. 110; 119 Mass. 414; 3 Robt. 84; 28 How. Pr. 475; 39 Iowa, 620; 31 Cal. 381; 4 Oreg. 57; 25 N. Y. 566, 567, 570; 29 Conn. 560.

² *Mooney v. Lower Vein Co.*, 55 Iowa, 671; *Bunt v. Sierra Buttes Co.*, 24 Fed. 647.

and that the *jiddy* should have been used for hoisting the water as well as the earth. The master was at the works several times each day. *Held*, that the master was not liable, the plaintiff himself having attached the bucket to the hook and the *plaintiff's fellow-workmen* having neglected to use the *jiddy*.

The declaration stated that the defendant, before and at the time of the committing of the grievances, etc., was making and sinking a certain shaft, and was possessed of a certain barrel then by the defendant used for drawing water out of the said shaft, which said barrel was then under the care and management of the defendant and certain other servants of the defendant; and, before the committing of the said grievances, the plaintiff had contracted with the defendant to do work for the defendant in and about the sinking of the said shaft; and in performance of that contract was at the time of the committing of the said grievances, lawfully and by the permission of the defendant in and at the bottom of the said shaft; yet the defendant, not regarding his duty in that behalf, by himself and his servants in that behalf, took so bad and such little care of the said barrel, and conducted himself by his said servants so negligently in the management thereof when using the same as aforesaid, *and the defendant found and provided and knowingly used and allowed to be used in and for the purposes aforesaid, such insufficient and improper machinery, implements and matters, and such insufficient, improper and unfit processes and modes for the purpose aforesaid,*¹ that by reason of the premises and of the said negligence and improper conduct of the defendant and his servants in that behalf, the said barrel fell down the said shaft and struck the plaintiff with great violence, and greatly injured the plaintiff, and the plaintiff was thereby knocked down, greatly hurt, permanently lamed, etc.

Pleas: First, not guilty. Second, that, before and at the time of the committing of the supposed grievances, the plaintiff was the servant of the defendant, working for certain wages, etc., and that, at the said time when, etc., the plaintiff was in and at the bottom of the said shaft in the performance of his duty as such servant and not otherwise howsoever; and

¹ The words in italics were not in the declaration as originally drawn, but were inserted in pursuance of leave to amend given at the trial.

that the plaintiff never contracted with the defendant to work for the defendant in or about the sinking of the said shaft, or otherwise, save to work for the defendant as such servant as aforesaid, at wages as aforesaid. The plaintiff took issue on this plea.

At the trial before Byles, J., at the Liverpool spring assizes, it appeared that the plaintiff was a mine sinker employed by the defendant to assist in sinking a shaft or coal pit belonging to the defendant, at Hindley, near Wigan, in Lancashire, at daily wages. On the 7th of October, 1857, he was at work at the bottom of the shaft, part of his duty being to assist in filling tubs with water and earth, which, being attached to the rope by the plaintiff himself or his fellow-workmen at the bottom, were drawn up to the top by the rope, which ran over a pulley above the mouth of the pit. The following is the mode in which the tubs are raised: The tub is attached to the rope by hooks; the tub is then raised a few feet, and if, on being tried, it is found to be securely hooked, the man at the bottom of the pit cries out "all right," and upon that it is wound up. It was alleged to be the duty of the banksman, when a tub arrives a little above the surface of the ground, to place a jiddy or slide so as to prevent it from falling back when unhooked from the end of the rope. The defendant was in the habit of coming to the workings several times in the course of the day. He had provided a jiddy, and directed that it should be used when earth was brought up, but not for water. The defendant had employed a competent banksman. On the occasion in question, the plaintiff had assisted in filling a tub with water. The tub, having been drawn up to the surface to be emptied, fell from the top upon the plaintiff and injured him. Evidence was given that the jiddy ought to have been used for water as well as earth, and that the hook for attaching the tub to the rope was dangerous, not being fitted with a spring, or sufficiently long. It was suggested that the accident had arisen from the want of a jiddy and the defective hook, the tub having become released from the hook, before it was properly landed. The plaintiff knew the hook which was used and had made no complaint of it, but he had complained, in the defendant's presence, that the jiddy was not used for water. Other workmen had com-

plained of the danger of working in the pit with the tackle used.

The learned judge told the jury that the defendant was not liable if the accident was occasioned by the negligence of the plaintiff or his fellow-workmen, but that they might find the defendant guilty if they thought that it was caused by the improper omission to use a part of the machinery, if such omission existed by the defendant's order or with his sanction: in other words, that the defendant was liable if the accident was occasioned by an improper and dangerous process habitually used by him or with his sanction. The jury found a verdict for the plaintiff.

MONK, in Easter term, had obtained a rule *nisi* for a new trial on the ground of misdirection in this: That the learned judge ought to have told the jury that, if the plaintiff knew that the machinery employed was insufficient, or that the course of practice pursued was unsafe, and, notwithstanding such knowledge, continued in the defendant's employment, he could not recover; or why the judgment should not be arrested.

KNOWLES and MILWARD showed cause.—The defendant was guilty of personal negligence in providing improper machinery, which was used under his direction after he had notice that it was unsafe. In *Roberts v. Smith*, 2 H. & N. 213, a laborer was examining the put-logs of which the scaffold was to be built, when the defendant, the master, stopped him, and told him not to break any more, though in building the scaffold the laborer used only such materials as he thought sufficient; it was held that there was evidence to go to the jury of the master's negligence, upon which they might find for the plaintiff. There the act which immediately caused the accident was that of the plaintiff's fellow-servant. That case was not so strong as the present, because here the master had *express* notice of the dangerous character of the *particular* machinery which was to be employed. Knowing the danger he ordered the jiddy to be used for earth only. In *Patterson v. Wallace*, 1 Macqueen, 748, 751, it was laid down that "it is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when, in fact, the master knows, or ought to know that it is not so, and if from any negligence in

this respect damage arises, the master is responsible." The plaintiff seeks to make the defendant, his master, responsible, not for any negligence of his fellow-servants, but for the defendant's own neglect in not providing a proper hook. If a rule is to be laid down that a servant shall not recover against his master for an accident occasioned by the master's willfully neglecting to provide safe tackle for the use of his servants, or recklessly directing the use of that which he knows to be unsafe, because the servant may have suspected the tackle to be unsafe, it will be productive of great hardships in practice. The plaintiff here was a collier, and therefore subject to the provisions of the 4 Geo. 4, c. 34, Sec. 3. Suppose that, considering the machinery unsafe, he had chosen to quit his service, he might have been compelled by the magistrates to have returned to his work, and punished by imprisonment for quitting his employment, unless he could have shown to their satisfaction that the machinery was obviously unsafe and insufficient. It can not, therefore, be laid down as a rule that, in continuing to work under such circumstances, the servant voluntarily undertakes the risk arising from the master's recklessness or negligence.

MONK and PARKER, in support of the rule.—First, as to the alleged neglect in not causing the jiddy to be used. The master had provided a proper jiddy, and had employed competent workmen, who might have used it. He had therefore done all that the law requires a master to do. (MARTIN, B.—I think that he ought to have insisted on the jiddy being used for water. He gave orders to the banksmen to use the jiddy for earth.) The principle is well established that a servant undertakes the risk incident to his employment, and can not turn around and sue his master for an accident occasioned by the risk he has so undertaken. Thus, in *Priestley v. Fowler*, 3 M. & W. 1, the master was held not responsible for an accident to his servant arising from a defect in the construction of a van, which, being overloaded, broke down. (POLLOCK, C. B.—No doubt, it is rather the business of a coachman than of the master to ascertain the state of the vehicle he drives. Suppose the wheel of a carriage is defective, and the master observes it and expresses his opinion about it; if after that, the servant chooses to drive, he would take his risk with his master.)

In *Assop v. Yates*, 2 H. & N. 768, the master was held not liable, for the reason, amongst others, that the servant, after having complained of the boarding, voluntarily continued at work. In *Skipp v. The Eastern Counties Railway*, 9 Exch. 223, a similar point was decided; there the learned judge said that the defendant was liable if the accident was occasioned by an improper and dangerous practice habitually used by him and with his sanction. Now, in *Dynen v. Leach*, 26 L. J. Exch. 221, Bramwell, B., said: "There is nothing legally wrongful in the use, by an employer, of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his work as to expose his workmen to the peril of their lives, but it does not create a right of action for an injury which it may occasion when the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery and voluntarily uses it." In the present case, the learned judge's direction was defective in not adverting to the fact that the plaintiff had notice of the danger. (POLLOCK, C. B. —If there is a dangerous process which is convenient to the workmen, the master is not bound to compel them to use a safe one. They may, for their mutual convenience, incur the greater risk.) The remarks of Lord Cranworth, in *Patterson v. Wallace*, 1 Macqueen, 748, apply only to a case where the servant has no notice of the danger he is incurring. The fact that the jiddy was not used by the banksman was a species of risk which a servant undertakes as one of the risks of his service: *Wiggett v. Fox*, 11 Exch. 832. One of the reasons which induced the court to hold the defendant not liable in that case was that, from the nature of things, a workman is just as likely to be acquainted with the risks he runs as the employer. *Hutchinson v. The York, Newcastle & Berwick Railway Company*, 5 Exch. 343, is to the same effect. As to the defect in the hook, the plaintiff was the person who himself attached the bucket to the hook, and though he had complained of the insecurity of it, he did not quit his employment but voluntarily took his chance of what might happen. *Cur. adv. vult.*

The judgment of the court was now delivered by WATSON, B.

This is an action to recover damages for an injury sustained by the plaintiff. The circumstances were these: the plaintiff was a mine sinker, and was, together with several other workmen, employed by the defendant in sinking a coal pit in Lancashire. The plaintiff was at work at the bottom of the pit, and had assisted in filling a tub with water, which was drawn up to the top to be emptied. Owing to something which occurred at the top, where other workmen were employed to empty it, the tub fell down the pit and injured the plaintiff.

The cause was tried before my brother Byles at the last Liverpool assizes, and a verdict found for the plaintiff, and a rule was obtained for a new trial, which has been argued before us. On the argument, it was admitted by the learned counsel for the plaintiff, that it has now been settled, by all the courts at Westminster Hall, that a master is not responsible for an injury sustained by a servant for the mere negligence of a fellow-servant engaged in the same employment; but the court of exchequer chamber, in *Roberts v. Smith*, 2 H. & N. 213, has decided that it is the master's duty, when he personally interferes, to take care to provide that the tackle and apparatus supplied by him is proper and secure, and that he is liable for damage caused by want of due care in this respect. The same principle was laid down by the House of Lords in *Patterson v. Wallace*, 1 Macqueen, 748, as existing in the law of Scotland, and it was sought to bring the present case within it by two circumstances.

First, evidence was given that the hook by which the barrel was attached to the tackle which drew it up was not safe; that it ought to have been a spring hook, which it was alleged would have prevented the misfortune which led to the accident. The answer to this seems to us to be that the plaintiff himself knew the hook which was used, and worked with it himself, possibly attached it to the tub or barrel which afterward fell upon him, and seems never to have made any observation or complaint in respect of it. We think that a servant so acting can not maintain an action against his employer. He himself was contributory to the injury, and, as it was stated by Lord Cranworth, in the case in the House of Lords, it is essential for the plaintiff or pursuer to establish that the injury arose from no rashness of his own.

The second circumstance relied on was, that an apparatus called a jiddy was not used. It was proved that the defendant had supplied a jiddy for the purpose of being placed over the top of the pit where the tub was emptied, and the workmen at the top used it when soil or earth was brought up, but not when water was raised out of the pit. It was proved also that the defendant was in the habit of coming to the place where the pit was sinking several times daily. We think that the defendant is not rendered liable by these circumstances. He supplied a proper apparatus. The plaintiff's fellow workmen neglected to use it; there was no evidence that the defendant gave any direction whatever to this effect, and it seems to us that to hold the defendant liable would be to utterly fritter away the rule that the master is not answerable for an injury caused to one servant by the negligence of another. In the case of *Vose v. The Lancashire & Yorkshire Railway Company*, 2 H. & N. 728, 734, this court expressed an opinion that extreme caution should be used not to relax the rule, and to this we adhere. We therefore think that the rule must be absolute for a new trial.

Rule absolute.

See *The Bartonhill Coal Co. v. Reid*, 3 Macqueen, 266.

SENIOR, Adm'x, v. WARD.

(1 Ellis & Ellis, 385. Queen's Bench, 1859.)

Acquiescence in known neglect of fellow servant. When a servant is injured or killed while in the employ of his master, by an accident resulting from the habitual negligence of his fellow servants, known and acquiesced in by the master, the master is not liable to an action by the servant, or, if he be killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident.

Idem—Unless there be such contributory negligence by the servant, the master is liable.

Master and servant—Knowledge of habitual violation of rules. Defendant, proprietor and manager of a colliery, published under statute 18 and 19 Vict. c. 108, special rules, one of which provided for the testing

¹ *Ohio Ry. Co. v. Collarn*, 73 Ind. 261; 38 Am. R. 134.

each day, in a particular manner, the rope by which the pitmen descended. This rule was, to defendant's knowledge, habitually violated by the banksman and others, whose duty it was to carry it out. S., a pitman in defendant's employ, who knew of the rule and of its habitual violation, refused, though advised by the banksman, to examine the rope (which had been accidentally injured the night before, and not tested since) before descending by it into the pit. The rope broke and S. was killed. *Held*, that the defendant was not liable.

Declaration by Hannah Senior, administratrix of John Senior: For that, on 6th January, 1858, and after the coming into operation of Stat. 18 and 19 Vict., c. 108, entitled "An act to amend the law for the inspection of coal mines in Great Britain," defendant was the proprietor and manager of a coal mine then being in his care and direction, and so continued until, etc., the time of the committing, etc.; that the said John Senior was a servant of defendant in the working of his said mine; nevertheless, by the wrongful act, omission, neglect and default of defendant, and not otherwise, a rope of defendant, in his use, and by the aid of which the said John Senior was, in the course of his said service, and with the privity and authority of defendant, being lowered into the said mine to work there for defendant, without any default of the said John Senior, suddenly snapped and broke asunder, the same having become and then being unsafe and unfit for such use; whereby, and not otherwise, the said John Senior, who neither knew nor had the means of knowing at any time that the said rope was so unfit or unsafe, was suddenly thrown and fell down into the said mine, and was thereby so greatly injured that he afterwards, and within twelve calendar months before this suit, thereof died.

Pleas: 1. Not guilty. 2. That defendant was not manager of the said coal mine, nor was the same nor did the same continue to be, then under his care and direction as alleged. Issue on both pleas.

At the trial, before Cockburn, C. J., at the last summer assizes for Derbyshire, it appeared that the action was brought under Stat. 9 and 10 Vict., c. 93, by the plaintiff, a widow, to recover damages for the death of her son, John Senior, who was accidentally killed while in the employ of the defendant. The defendant, who was the proprietor and manager of a

colliery at Killamarsh, had, after the passing of Stat. 18 and 19 Vict., c. 108, drawn up special rules for the management of the colliery, which were duly approved and published under the act. The following were referred to in the course of the argument.

"1. That the owner or agent, being the manager of the colliery, shall provide the viewers, underviewers, engineers, deputies, and other persons placed in situations of responsibility, at their request, all facilities, materials, and assistance requisite in the opinion of such owner or manager for conducting the colliery in such a manner as will best conduce to the safety of the persons employed therein; and that he or they shall do the utmost in their power to employ efficient officers, enginemen, banksmen, hangers-on, and other responsible persons in their several departments; and shall require from time to time reports from such officers as to the due observance of the general and special rules, and the safe condition of the colliery.

"2. The owner, agent, underviewers, or deputies shall have control over all persons employed at this colliery, and the latter must obey their lawful commands in their respective occupations; and the deputies must report to the agent or underviewer any violation of these rules, or of their own orders, so that steps may be taken to insure discipline throughout the works, with a view to the preservation of life."

"**ENGINEMEN, BANKSMEN AND HANGERS-ON.**"

"33. Every morning before the engine is started, the engineman shall see that the engine, boilers, machinery, drums, ropes, breaks, indicators, and signal bells are safe and in good working order; the ropes and loaded cages are then to be run slowly twice up and down the pit, before any person descends or ascends."

"42. The head banksmen must be at the pit not later than six o'clock in the morning, and provide a sufficient number of lights; and before the engine is started he must see that the pulleys, ropes, cages, chains, and landing doors or frames are in safe working condition; and he shall not allow any person to descend or ascend the pit until the ropes and loaded cages have been twice run up and down, and the ropes, chains, cappings and cages carefully examined by him; and if any weak-

ness or defect is found in anything belonging to the pit-top, or in the engine or machinery, he must not permit any person to descend or ascend until it is made secure," etc.

It was proved that the rule requiring the loaded cage to be run up and down every morning, before any person was permitted to descend, had been habitually violated by the engineman and banksman, to defendant's knowledge, for many weeks before the accident; and that the deceased and his two brothers, who were employed by the defendant as miners, were acquainted with the rule, and knew that it was so violated. On the night of 5th January, 1858, the rope by which the cage was run up and down, and which had been previously in good condition, was injured by a fire which occurred at the colliery. The next morning, the deceased, his two brothers and another miner, came to the pit for the purpose of descending. The engineman and banksman had examined the rope that morning, before it was light, and had not detected any injury; but they had not tested it with the cage according to the rule. The banksman told the deceased and his companions that they had better examine the rope before descending. They did not do so, and got into the cage; the rope broke as the cage was descending, and they were all four killed.

A verdict was found for the plaintiff for £80, with leave to move to enter the verdict for the defendant, or for a non-suit. Two other actions by the plaintiff, for the death of her two other sons, respectively, were to abide the event of this action.

MELLOR, in last Michaelmas term, obtained a rule to show cause why a verdict should not be entered for the defendant, or why a non-suit should not be entered, or a new trial had, "on the ground that the negligence which occasioned the death of the plaintiff's son was not the negligence of the master, but of a fellow workman, not shown to have been incompetent for the discharge of the duties devolved upon him."

MACAULAY and BREWER, on a later day in that term, showed cause.—There is nothing in this case to take it out of the rule, which may be gathered from *Hutchinson v. York*,

Newcastle and Berwick Railway Company, 5 Exch. 343, *Priestley v. Fowler*, 3 M. & W. 1, *Tarrant v. Webb*, 18 Com. B. 797 (E. C. L. R. Vol. 86), and *Roberts v. Smith*, 2 H. & N. 213, that although a master is not liable for an accident caused to his servant by the negligence of a fellow servant, provided the master has not been guilty of negligence, omissive or commissive, yet he is liable if the fellow servant causing the accident was negligent or incompetent to the master's knowledge, or if the accident was the result of a general system of negligence on the part of his servants which was known and acquiesced in by him. Here the defendant knew and acquiesced in the habitual violation, by his servants, of the special rules of the colliery, approved by the inspectors as proper for the safety of those employed in the mine; the accident was the result of that habitual violation, and the defendant is therefore liable.

MELLOR, *contra*.—Even if the defendant was aware of the general violation of the rules, his negligence would be too remote to render him liable for this particular result of that violation. The violation of the rules on the occasion in question, viz., the neglect to test the rope, was not the negligence of the defendant, but that of his servants, for which he is not liable, according to the rule laid down in *Priestley v. Fowler*, which has been universally recognized, and confirmed by all subsequent cases involving the same question. There is nothing to show that the defendant knew of the special injury to the rope; and the negligence of his servants, who did know of it, does not make him liable, if they were reasonably competent for the employment; that is clear from *Priestley v. Fowler* and *Hutchinson v. York, New Castle and Berwick Railway Company*. The case falls within the rule established by those cases and *Wigmore v. Jay*, 5 Exch. 354, *Skipp v. Eastern Counties Railway Company*, 9 Exch. 223, *Seymour v. Maddox*, 16 Q. B. 326 (E. C. L. R. Vol. 71), and *The Bartonshill Coal Company v. Reid*, 3 Macq. App. Ca. 266, that a servant, as between his master and himself, is to be considered as taking upon himself all the ordinary risks of the service into which he enters, including those arising from the acts of his fellow servants, if they are not incompetent, to the knowledge of the master.

But, further, the deceased contributed to the accident by his own negligence, in disregarding the warning of the banksman to examine the rope before descending. It is therefore immaterial whether the defendant did or did not know of the negligence of his servants, either generally or in the particular instance. If the deceased had survived, he could not have brought an action against the defendant: *Griffiths v. Gidlow*, 3 H. & N. 648; and the personal representative has no wider right of action, under Stat. 9 and 10 Vict., c. 93, than the deceased would have had. *Griffiths v. Gidlow* is also an authority to show that, if the master provides proper apparatus, he is not liable to a servant for an accident caused by the negligence of fellow servants in working it.

LORD CAMPBELL, C. J., now delivered the judgment of the court.

We are of opinion that the rule to enter the verdict in this case for the defendant or to enter a nonsuit must be made absolute.

The authorities upon the subject are all collected and commented upon in *The Bartonskill Coal Company v. Reid*, 3 Macq. App. Ca. 266. According to these authorities, the action would not have been maintainable if the deceased had come to his death purely from the negligence of his fellow servants employed in the same work with him. However, a strong case of negligence on the part of the defendant, as contributing to the death, has been made out; and if an answer had not been given to this case, by showing negligence on the part of the deceased which contributed to his death, we think the defendant ought to have been held liable. After the passing of Stat. 18 and 19 Vict., c. 108, for the inspection of coal mines, under Sec. 5, special rules were framed, and duly approved of, for the regulation of the defendant's colliery; and by one of these rules it was provided that every morning, before the miners were let down the shaft into the mine, the cage by which they were to descend should be let down and pulled up again, heavily loaded, to test the sufficiency of the rope and of the tackling. But the defendant, who superintended the working of his colliery, instead of

enforcing this rule, allowed it to be entirely neglected; and, to his knowledge, it had been entirely neglected by his workmen for many weeks before the accident happened which caused the death of the deceased. The night before the accident the rope by which the cage was suspended, being then in good condition, was injured by an accidental fire in the colliery. Next morning the deceased and other miners were let down the shaft, without any testing of the rope and the tackling. If that testing had taken place, the insufficiency of the rope would have been discovered, and the men would all have been saved. But the rope broke, and the deceased, with several others, was killed on the spot. There was most culpable negligence on the part of the defendant in neglecting the rule, and in keeping in his employment a banksman who he knew habitually disregarded it. Looking to these facts only, although the banksman was the fellow servant of the deceased, and both the deceased and he were employed by the defendant in the colliery as fellow laborers, we should have held the defendant liable, his negligence having materially contributed to the death of the deceased.

But according to the report of the learned judge who tried the cause, it was further in evidence that gross negligence was to be imputed to the deceased himself, and that this negligence materially contributed to his death. With the exercise of ordinary prudence he would have escaped the danger and his life would have been saved. He knew the rule of testing the rope and tackling every morning, and he knew that this rule was habitually violated; further, in the morning of the accident, he and the other miners were told by the banksman that they had better examine the rope before they went down. Nevertheless they disregarded this warning, and, immediately getting into the cage, the rope broke as it descended, and they were killed.

We conceive that the legislature, in passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence. Under the circumstances of this case, could the deceased, if he had survived, have maintained an action

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against the defendant for what he suffered from the accident? We think that he could not; for, although the negligence of the defendant might have been an answer to the defense that the accident was chiefly caused by the negligence of a fellow servant, the negligence of the plaintiff himself, which materially contributed to the accident, would, upon well-established principles, have deprived him of any remedy. *Volenti non fit injuria.*

The other two cases grouped with this, were to abide the same event. In each of them the deceased was adult, and, with the same knowledge, conduced to the same fatal result. Therefore in all the three we must give judgment for the defendant.

Judgment for the defendant.

¹ WOLF ET AL. v. ST. LOUIS INDEPENDENT WATER CO.

(15 California, 319. Supreme Court, 1860.)

Trustee of stock—Liability—Witness. A person who holds stock upon the books of a water company and holds an office, viz., that of secretary, to which stockholders only are eligible, although he holds the stock only in trust for another, is responsible for the debts of the company, as a stockholder, and therefore disqualified as a witness for the company.

² **No defense that injury could have been prevented by the commission of a trespass.** In an action for flooding a mining claim the fact that plaintiffs could have avoided the injury by pulling off a board from defendant's flume, thus diverting the water, is no defense. They could have done so only by the commission of a trespass, and are not to be denied redress because they appeal to the law rather than violate it.

Appeal from the Seventeenth District.

Action of damages for overflowing plaintiffs' mining claims. Defendant, a water company, owned a flume running across plaintiffs' claims. The water in the flume occasionally ran over the sides and on to plaintiffs' claims. On a certain night

¹ S. C. on former appeal, 10 M. R. 636.

² *Grant v. Allen*, 41 Conn. 156. The case in the text only decides that he was not bound to commit a trespass to save his property; but in such case would his entry have been a trespass? *Surocco v. Geary*, 3 Cal. 69; *American Works v. Lawrence*, 21 N. J. Law, 248; 23 Id. 590; *Dewey v. White*, 1 Moody & M. 56.

there was a severe snow storm, and in the morning the water of the flume was found pouring over its sides, for a distance of about ten feet, down on to a pile of pay dirt belonging to plaintiffs—the dirt being in a cut about twenty-five feet wide and ten feet deep, across which the flume ran. Sluices led from the cut into a ravine. The damage claimed was mainly for this pay dirt, washed away through the sluices and otherwise.

Plaintiff Wolf, on being informed by a neighbor in the morning that the water was overflowing, etc., went to St. Louis, a mile distant, and notified defendant. By pulling off a board from the flume a few feet above the cut the overflow could have been stopped, but plaintiff declined to do so, alleging as his reason, that he had not the right.

On the trial defendant offered as a witness one Wheeler, who testified on his *voir dire*, that he had no interest in the company; that the stock standing in his name was transferred to him for the sole purpose of making him eligible as secretary of the company, he receiving as such secretary a salary of one hundred dollars per month.

STEWART & THORNTON, for appellant.

A. W. BALDWIN, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

The witness Wheeler was incompetent, and was properly excluded. He permitted himself to be represented on the books of the company as a stockholder, and held the office of secretary, to which no person but a stockholder was eligible. Under these circumstances every person dealing with the company had a right to suppose that he was a member, and he could not escape responsibility for the debts of the company, by showing that the stock standing in his name was held in trust for another. The trust, if any, was only implied, and we think the seventeenth section of the Corporation Act of 1853 was intended to apply only to the trustee of an express trust.

There is nothing in the point that the plaintiffs might, by ordinary diligence, have avoided the injury of which they complain. They could have done so only by the commission

of a trespass, and surely they are not to be denied redress because they have chosen to appeal to the law, rather than violate it.

Judgment affirmed.

TODD V. COCHELL ET AL.

(17 California, 97. Supreme Court, 1860.)

Injuries to garden by breaking of reservoir—Degree of negligence—Error in instruction cured by explanation. In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that, to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of the plaintiff been their property; and that otherwise they had been guilty of gross negligence, and were liable in damages: *Held*, that although the instruction without the explanation was wrong, still, with the explanation, it was right and could not have misled the jury.

Appeal from the Ninth District.

Verdict for defendants; judgment accordingly, and plaintiff appeals.

E. GARTER, for appellant, cited 2 Kent, 282, note 1; 1 Cow. Tr. 384–387, and cases cited; 8 Johns. 421; 17 Id. 92, 93, 100.

R. T. SPREAGUE, for respondents, cited *Tenney v. Miners Ditch Co.*, 7 Cal. 335; *Hoffman v. Tuolumne Water Co.*, 10 Id. 413; *Wolf v. St. Louis Water Co.*, Id. 541.

COPE, J., delivered the opinion of the court, BALDWIN, J. and FIELD, C. J., concurring.

This is an action for injuries to a garden, occasioned by the breaking of a reservoir. On the trial of the case, the court instructed the jury that, to entitle the plaintiff to recover, it

must appear that the breaking of the reservoir resulted from the gross negligence of the defendants. This instruction, considered by itself, was no doubt erroneous; but the court proceeded to explain what was meant by gross negligence in such a manner that the jury could not have been misled. They were told that the defendants must have taken the same care of their reservoir and the water in it as they would have done, being prudent men, had the garden of the plaintiff been their property; and that otherwise they had been guilty of gross negligence, and were liable in damages. We understand the law to be well settled, that the measure of care required in such case is that which a discreet person would use if the whole risk were his own. The conduct of the defendant must be viewed with reference to the caution which a prudent man would, under the given circumstances, have observed. This is the rule laid down in *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413, and in *Wolf v. St. Louis Water Co.*, Id. 541.

We think the case was fairly submitted to the jury, and we are unable to perceive that any injustice has been done.

Judgment affirmed.

CAMPBELL V. BEAR RIVER AND AUBURN WATER AND MINING CO.

(35 California, 679. Supreme Court, 1868.)

¹ **Careless management of water ditch.** In an action for injury to land by reason of the alleged careless management of defendant's water ditch, the rule applicable is, that "defendant is bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs."

Demurrer overruled—Error without prejudice. Although the court below erroneously overruled the plaintiff's demurrer to the affirmative matter set up in the defendant's answer, yet, because the defendant offered no proof in support of such affirmative matter, the plaintiff was not prejudiced thereby and the judgment will not be reversed.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

¹ *Richardson v. Kier*, 4 M. R. 612.

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The plaintiff's land is situated in Placer county. The portion of the defendant's answer which set up fraud in the procurement of the plaintiff's patent, and other affirmative matter in defense to the action, was as follows :

"Defendant avers that if said plaintiff or her predecessors in interest ever had or now have such patent for such last named land, or any of them, that the same has been, by plaintiff and her predecessors, procured and obtained by fraud in this way: By falsely and fraudulently representing to said United States government and the officers thereof, that the said lands were agricultural lands, and were open for entry, location, and sale; whereas, in truth and in fact, the same were not agricultural lands, or more valuable for agricultural than mining purposes, but were and are mineral lands, composed of deposits of soil, gold-bearing gravel, earth, and rock of great depth and value, and have been, by the laws of the United States and the lawful proclamations in pursuance thereof, declared to be and were withheld and reserved from entry, location, or sale—all of which the said plaintiff and her predecessors in interest well knew. And for other and further answer herein, defendant avers that it is, and for more than fifteen years has been, a corporation, duly organized and existing under and in pursuance of the laws of the State of California, for the purposes of and engaged in the business of constructing ditches to convey water for mining and other purposes, and during said period has constructed and been using that certain ditch commonly known as the Bear River Ditch, and its branches, commencing at Bear river, in said county, about twenty miles northeasterly from the town of Auburn, in said county, and passing by said Auburn to the mines adjacent thereto and below said Auburn, and conveying water thereto to be used for mining, agricultural, and other purposes, and supplying the same when and where demanded, over an area of more than a hundred and twenty square miles of the territory and lands in said county. That at the time when the same was constructed over the lands described in said complaint, to wit, in the year A. D. 1852, the said lands and the whole thereof were the public lands of the United States, and so far as the same were necessary to the construction and use of said ditch the same were appropriated by defendant to such construction

and use; and since said appropriation and construction, the Congress of the United States, by statute duly entered, hath ratified, acknowledged and confirmed unto said defendant the use of said lands and the said appropriation thereof, and the right of way through, over and across the same."

The other facts are stated in the opinion of the court.

JO HAMILTON, for appellant.

TWEED & CRAIG, for respondent.

By the Court, CROCKETT, J.

This is an action to recover damages for an alleged injury to plaintiff's lands, resulting from the careless management of the defendant's water ditch, which traverses the land. The complaint avers that the plaintiff is the owner in possession of the land, under a patent of the United States, and had appropriated it for agricultural purposes before the construction of defendant's ditch. It avers that the defendants had so negligently constructed and managed the ditch that by reason thereof the plaintiff's grounds were submerged and covered with sand and gravel, and her buildings and orchard seriously injured. The answer does not sufficiently deny either the prior appropriation of the land by the plaintiff, or that she holds it under a patent from the United States; but avers that her patent was obtained by fraud, and denies all negligence in the construction or management of the ditch, or that the plaintiff has suffered any damage from that cause. The plaintiff demurred to so much of the answer as sets up affirmative matter, but the court overruled the demurrer, and the plaintiff excepted.

On the trial the evidence was conflicting in respect to the negligence complained of, but the defendant offered no evidence in support of the allegation of fraud in procuring the patent, and the patent was put in evidence by the plaintiff. A verdict and judgment having been rendered for the defendant, the plaintiff moved for a new trial, which was denied, and the plaintiff has appealed.

The only errors complained of are: 1st. The overruling

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of the demurrer to the answer. 2d. The refusal of the court to give two instructions to the jury which were requested by the plaintiff.

We incline to the opinion that the court ought to have sustained the demurrer to the affirmative matter set up in the answer, but it is evident the plaintiff has suffered no damage from this course. The court instructed the jury that the pleadings admitted the prior appropriation of the land by the plaintiff, and the issuing of the patent, and no proof was offered by the defendant with the intent to impeach the patent. The plaintiff's case was not damaged by the affirmative matter in the answer, which was not attempted to be supported by proofs. The only issue before the jury, to which any evidence was adduced, was in respect to the alleged negligence of the defendant, and the consequent damage to the plaintiff. It would be a vain act, therefore, to reverse the judgment because the district court erroneously allowed to remain in the answer affirmative matter which was not supported by proof, and which can in no manner have prejudiced the plaintiff.

At the instance of the plaintiff, the court very fully and correctly declared to the jury the principles of law applicable to the case. After instructing the jury that the pleadings admit the prior appropriation of the land by the plaintiff, and that she holds them under a patent, the court further instructs that "the law obliges every person to so use his own property as to do no damage to another. If the rights of both parties are of equal priority, the person doing the damage is bound to use the same degree of care which a prudent person would use if he were the owner of the property in danger of being injured." This phraseology is not very accurate, and if subjected to criticism would be pronounced decidedly faulty. But its meaning is obvious, and could not have misled the jury. The principle it announces is, that in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances, if he were himself the owner of the property exposed to damage.

This is a correct exposition of the law applicable to the case. The defendant was bound to the use of such care in the man-

agement of the ditch as prudent persons employ in the conduct of their own affairs: *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 544; *Richardson v. Kier*, 34 Cal. 63. But the court refused to give an instruction asked by the plaintiff, to the effect that the defendant was liable, unless the damage was "the result of inevitable accident, and not from any mixture of fault or negligence on the part of the defendant, either in the construction, care, or keeping of its ditch."

This instruction states the proposition too broadly, and was properly refused. The other instruction which was asked and refused is even more objectionable. It asks the court to declare that inasmuch as the plaintiff had appropriated the land "before the building of defendant's ditch," the defendant was bound to use "more than ordinary care in the building, conduct, and management of its ditch, and is liable for damage which it occasions, if the same could have been avoided by any possibility."

The plaintiff concedes that the defendant had the lawful right to "run its ditch where it runs. Plaintiff only asks for such damages as have been caused by defendant's want of care in and about its ditch and waters." This is the substance of an instruction given on the request of the plaintiff. If the defendant had the right to traverse the land with its ditch, as the plaintiff concedes, it could be required to exercise no greater care, to avoid injury to the adjoining lands, than prudent persons would employ about their own affairs under similar circumstances. It was not bound to indemnify, the plaintiff for all damage which could have been avoided "by any possibility," but only for such damage as resulted from a want of the ordinary care which prudent persons exercise in the management of their own property.

Judgment affirmed.

LITTLE SCHUYLKILL NAVIGATION, RAILROAD AND
COAL CO. V. RICHARDS' ADMINISTRATOR.

(57 Pennsylvania State, 142. Supreme Court, 1868.)

¹ **Coal dirt in stream—Contribution to injury.** A dam was filled by deposits of coal dirt from different mines on the stream above the dam, some worked by defendants and their tenants, and others by persons entirely unconnected with the defendants. The court charged that if, at the time the defendants were throwing coal dirt into the river, the same thing was being done at other collieries, and they knew of it, they were liable for the combined results of all the deposits. *Held*, erroneous. The ground of the action is not the deposit of the dirt in the dam by the stream, but the negligent act above. The liability of the defendants began with their own act on their own land, and being several when committed, did not become joint because its consequences united with other consequences.

² **Tort of lessees.** Lessors are not liable for the wrongful acts of the lessees of their mines not done by their authority or command.

Sending out papers with jury. As a general rule, with some exceptions, the sending out of papers with the jury is regulated by the sound discretion of the court trying the case.

Error to the Court of Common Pleas of Schuylkill County.

This was an action on the case, to March term, 1858, brought by Matthias S. Richards against the Little Schuylkill Navigation, Railroad and Coal Company.

The declaration contained two counts. The first was for injury to the forge dam of plaintiff, upon the Little Schuylkill river, by reason of defendants, by their servants and employes, casting and throwing into said river, above the dam, and near to and along the said stream, large quantities of coal dirt, slate and loose earths, which by the action of the water were carried down to and filled up the said dam. The second was for burning up cord-wood and chestnut sprouts along line of defendants' railroad, by means of the negligent use of locomotives thereon. The plea was "not guilty."

The plaintiff having died, his administrator, William R. Gries, was substituted.

¹ *Bell v. Shultz*, 18 Cal. 450; *Post* TAILINGS.
² *Offerman v. Starr*, 10 M. R. 614; *Crusselle v. Pugh*, 67 Ga. 430; 44 Am. R. 724; *Samuelson v. Cleveland Iron Co.*, 49 Mich. 164.

The property to which the dam belonged was the Hecla Forge, which is situated on the Little Schuylkill river, about ten miles below Tamaqua, and which, prior to February 4, 1851, belonged to Young & Jones, who on that day sold it by articles of agreement to Judge Richards; the sale was consummated by deed, May 20, 1853.

Whilst the property was owned by Young & Jones, the dam had been nearly filled with coal dirt, but in 1850 a very great freshet occurred, which took away the dam breast, and entirely cleared the basin of the dam of the dirt. Judge Richards rebuilt the dam in 1851, immediately after he bought the property; he had both a forge and saw mill, and soon afterwards the coal dirt was deposited in the dam and race so as greatly to impede the works, and at some times almost wholly to obstruct them.

The defendants own a railroad which extends for about twenty-five miles along the Little Schuylkill river, and are also owners of a large body of coal lands situated on the same river and its branches, near Tamaqua. From 1849 to 1858 these lands were leased to tenants who mined the coal, and whose leases, for most of that time, required them to deposit coal dirt in such places as should be designated by the company.

Besides the mines of the defendants, there were a number of others on the Little Schuylkill and its tributaries, above Hecla Forge, owned by different owners, entirely independent of the defendants and having no connection with them. The dam was filled by the coal dirt coming down these several streams into it from all these mines. There was very much evidence bearing upon the cause of action in the case, including the extent of the participation of the defendants in producing the injury to the plaintiff's dam. The statement above given is sufficient for an understanding of the principal point discussed and decided by the Supreme Court.

On the trial, evidence having been given by the plaintiff that the defendants controlled the places of the deposit of the dirt by their several tenants, he called John Donaldson, who testified that he was superintendent, etc., of mines of the defendants worked by his father. The plaintiff then proposed to ask the witness whether any objection was made to him as superintendent of his father's mines, to the place of deposit

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of coal dirt, and the manner of depositing the same from such mines, to be followed by offering in evidence the leases from the company to Donaldson, by which it is provided that the coal dirt shall be deposited in such position and places as the said company or their agents may from time to time direct.

The offer was objected to by the defendants, admitted by the court, and a bill of exceptions sealed.

The defendants called Nicholas Jones, a former owner of the land, who testified that the water power was as much destroyed before the freshet in 1850 as at the trial, and that the injury to it was about the same.

They then offered in evidence two releases, dated February 26, 1848, and January 19, 1863, respectively, from Peter Jones and Nicholas Jones, for the purpose of showing that the defendants had already settled with the then owners of the land, and paid them in full for all damages by filling up the dam with coal dirt prior to 1850.

Objected to by plaintiff, rejected by the court, and a bill of exceptions sealed.

The court charged that there was no evidence in relation to fire.

The Court, RYON, P. J., amongst other things, charged:

* * * "If you should find that the plaintiff's pond was filled up with coal dirt deposited along the banks of the Schuylkill and its tributaries by the defendants, or under their direction, and by the Carters and the Lehigh Navigation Company, in such a manner and in such quantities as to be washed into the stream by the rains and by the ordinary and usual freshets, and that each knew that the other was at the same time so depositing their dirt—that is, if they were so depositing their dirt at the same time, and the acts of each were known to the other—we think either party would be liable for the whole damage. If the defendants were depositing their dirt, or directed their tenants to deposit it, where it washed into this pond by the ordinary rains and freshets, at the same time others, with the knowledge of the defendants, were depositing dirt also, which washed into this pond by the ordinary rains and freshets, can you, under the evidence, apportion the damage done by each with any reasonable certain-

ty? How much of the defendants' dirt and how much of the others' washed down? This case is unlike torts committed by different parties by independent acts, where the consequences flowing from the acts of each can be made reasonably certain by proof; for this dirt was deposited by the operation of years, and, as testified to, at some points it would wash down the stream, and at others it was put in the same place; and hence no approximate estimate can be made of how much or how little reached this pond from such deposits." * * *

"If you find for the plaintiff, the measure of damages is the damage sustained at the commencement of this suit in 1858. The plaintiff is not entitled to recover for permanent or prospective injury. The measure is the use of the mill and forge—what they were worth to the plaintiff for business purposes. This use may be measured by any proper mode of estimating its annual value. The plaintiff has proved the annual rental of the property, as unaffected and as affected by the coal dirt. We know of no better way, but submit the whole question to you. If you find for the plaintiff, he is entitled to recover what damages you think he has suffered from the acts of the defendants from 1851, the time he purchased, to the time suit was brought."

And refused to charge as requested by the defendants, that the plaintiff could not recover for the profits he might have made, or the rents he might have received, had the dam not been injured.

The court, against the objection of the defendants, permitted the plaintiff to send out with the jury a calculation of damages, based upon the estimated annual rent of the forge, with interest from the end of each year; and also a claim for wood burned and timber land destroyed.

The jury found for "the plaintiff for \$11,750, for damages sustained by the defendants filling their dam with coal dirt. This amount includes damages up to 1858, at the time the suit was brought, and interest up to the present date, June 22, 1867."

Judgment was entered generally against the defendants for \$11,750.

The defendants took a writ of error. They assigned thirteen errors—to the admission and rejection of evidence, the

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charge of the court; and permitting the statement to go out with the jury.

F. B. GOWEN and J. BANNAN (with whom was T. R. BANNAN), for plaintiffs in error.

F. W. HUGHES, with whom were G. E. FARQUHAR and F. HOFFMAN, for defendant in error.

AGNEW, J.

All the assignments of error, from the fourth to the eleventh inclusive, involve substantially the same question, and may be considered together. The plaintiff's intestate was the owner of a dam and water power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal dirt, washed down by the stream from the mines above, of several owners, upon Little Schuylkill, Panther creek and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal dirt into the river, about ten miles above the dam, the same thing was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 till 1858. The aspects of the case were varied, by deposits being made on and along the banks of the streams, which were carried away by ordinary rains and freshets; but the above is the most direct statement of the injury alleged, and is taken therefore as the test of the principle laid down by the court. The doctrine of the learned judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves by a slight negligence overwhelmed by others in gigantic ruin.

It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their

tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers, who should haul their rubbish upon a city lot and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream; this is the tort, while the deposit below is only a consequence. The liability, therefore, began above, with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do.

This is bad logic and hard law. Without concert of action, no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These

principles are fully sustained by the following cases: *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Buddington v. Shearer*, 20 Pick. 477; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479. These were cases where the dogs of several owners united in killing sheep, and where the cattle of different owners broke into an inclosure and united in the damage. The concert and united action of the dogs and cattle were held to create no joint liability of their owners, notwithstanding the difficulty of determining the several injury done by the animals of each. The rule laid down in the last case was that where the owner of the garden could not prove the injury of each cow, the jury would be justified in concluding that each did an equal injury. Several cases were cited in opposition, but do not, in our opinion, support the doctrine of the charge.

In *Stone v. Dickerson*, 5 Allen, 27, where an officer made an arrest at the same instant upon nine writs, and the parties were held jointly liable for the trespass, the ground of action was; the arrest itself, a single act, incapable of division or separation, but being authorized by all, all were held to have been concerned in the very act which each authorized the same agent to commit. In *Colegrove v. N. Y. & N. H. and N. Y. & Harlem Railroad Companies*, 20 N. Y. 492, the two companies were using the same track by joint arrangement governed by common rules; the collision of their trains was owing to mutual and concurring negligence, and the injury, which was single, was therefore their concurrent and direct act. They were held to be jointly liable because of their joint use of the track, their common duty to all traveling the road, and their concurrent negligence in the direct act which caused the injury. The case of the party wall in this State was put on the same ground. The distinction between that case and this was sharply defined by our brother Strong. It was there said that the maintenance of an insecure party wall was a tort in which both participated. The act was single and it was the occasion of the injury. The case is not to be confounded with actions of trespass brought for separate acts done by two or more defendants. Then if there be no concert, no common intent, there is no joint liability. Here, the keeping of the

wall safe was a common duty, and a failure to do so was a common neglect: *Klauder v. McGrath*, 11 Casey, 128. In principle, *Bard v. Yohn*, 2 Id. 482, more resembles this case. There the effects of the independent acts of the defendants on the opposite sides of the street united in causing the injury. but they were not jointly liable, because there was no concert in the acts themselves.

It is needless to notice other questions arising upon the alleged negligence, excepting to say that the defendants, as lessors, were not liable for the acts of their tenants, not shown to have been done under their authority or command. The mere relation of landlord will not make the lessor liable for the negligence of his tenant: *Bears v. Ambler*, 9 Barr, 193; *Offerman v. Starr*, 2 Id. 394.

Taking together all the judge said upon the measure of damages, it is not clear he committed a manifest error. There was an inaccuracy in the answer to the defendants' 7th point, as to the profits which might have been made, which would appear to allow too much latitude in estimating imaginary losses, and will be corrected in another trial. The jury, however, seem to have gone astray in estimating the property as a total loss from 1851 to 1858. The correction, however, fell within the province of the court below.

The objection to the calculations sent out with the jury can not be urged. No bill of exceptions was sealed. As a general rule, with some exceptions, the sending out of papers with the jury is regulated by the sound discretion of the court; *O'Hara v. Richardson*, 10 Wright, 389.

The bills of exception to the evidence need no particular notice. We perceive nothing in them pointing to any manifest error.

The judgment is reversed, and a *venire facias de novo* awarded.

THE ARDESCO OIL Co. v. GILSON.

(63 Pennsylvania State, 146. Supreme Court, 1869.)

- ¹ Rule as to corporate liability.** In an action by an employe of a corporation for injuries occasioned by the explosion of two oil stills in the refinery of the company: *Held*, that the officer having charge of the business must for all practical purposes be regarded as the corporation itself, and that the same rule of liability must be applied to corporations as to natural persons.
- Duty to employes—Safe machinery.** Employers owe to their servants and workmen the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and employing with them fit and competent superintendents and fellow workmen.
- ² Employment of competent persons.** If a person employs mechanics or contractors in an independent business, and they are of good character, and there was no want of care in choosing them, he is not liable for injuries to others from their negligence or want of skill.
- ³ Idem—Boller explosion.** If one employs a reputable machinist to construct a steam engine and it blows up from bad materials or unskillful work, the employer is not responsible for injury to his own servant or to a third person.
- Machinery built on employer's own plan.** The rule is different if the machine is made according to the employer's own plan, or he interferes and gives directions as to its manner of construction.
- There is no difference between liability to a stranger and to a servant** for a man's own negligence or want of skill.
- Negligence of fellow servant.** A master is not responsible for an injury to a servant by the negligence of a fellow servant, unless he has failed in ordinary care in the employment of the culpable party.
- What is due care and ordinary diligence** depends much on the kind of business and the sort of material handled.
- Expert—Discretion of court.** The competency of a person to give his opinion as an expert, if on a preliminary examination he appears to have any pretensions to speak as such, rests much in the discretion of the judge trying the cause.
- Idem.** It is not imperatively required that the business or profession of the witness should be that which would enable him to form an opinion.

Error to the District Court of Allegheny County.

This was an action on the case for negligence, brought March 29, 1867, by John P. Gilson against the Ardesco Oil Company. The plaintiff was in the employ of the defend-

¹ *Wilson v. Willimantic Co.*, 50 Conn. 433; 47 Am. R. 653.

² *Boscell v. Laird*, 10 M. R. 616.

³ *Indianapolis Ry. v. Toy*, 91 Ill. 474; 33 Am. R. 57.

ants as carpenter, at their oil-mills, and by the explosion of two of their stills he was badly injured; this suit was brought to recover compensation for the injury.

The case was tried January 11, 1869, before KIRKPATRICK, J.

A. T. Schmidt, superintendent of defendants, testified for plaintiff: that plaintiff worked about 150 feet distant from the stills; there were six stills, made by one Graber and another manufacturer; two of those made by Graber exploded; witness had frequently put up stills, but never any so large or made of iron so weak; Mr. O'Hara, president of the company, ordered the stills; he was there when they were put up; he did not consult witness about the stills. About two weeks after the stills were completed the oil—crude petroleum—was put in and fire put under them; as soon as the oil heated the stills moved up and down, both on the top and sides, which they should not have done; it frightened the witness, and he informed O'Hara immediately. He considered what he would do to prevent this; iron rods to stiffen the stills were put in; they did not consider that sufficient, but would try it; the rods were pulled out of their places; O'Hara told witness to consult Graber and to do what witness and Graber should think best; Graber came and found it difficult to know what to do; they put angle iron on the outside and on the top of the stills; put fire under a day or two afterward, about 5 o'clock in the morning; all went well till about 11 o'clock, when yellow smoke came out, but nothing very alarming; about 12 o'clock the smoke increased and the explosion occurred; the top of one still was lifted off and part of the side; plaintiff was in his shop, which was set on fire almost immediately, and the plaintiff badly burned. Witness thought the stills too large for the thickness of the iron, but thought they would do when the angle iron was put on. Other witnesses testified that when the oil was heated the stills surged and heaved which should not have occurred.

T. H. Cargo testified that he was steam fitter at the defendants' works, and was there at the explosion. He had no knowledge of stills except working with them and fitting them up after they are put up.

The plaintiff then proposed to ask witness, whether, in his opinion, the iron of which the tank was composed was of sufficient strength. The question was objected to, because the

witness had not shown himself to be an expert. The court allowed the question to be put and sealed a bill of exceptions.

Witness did not think the iron was strong enough when the stills were put up; before the still which exploded was put up there was a small crack on its top. There was other evidence by the plaintiff bearing upon the question of the character of the stills, of the repairs to them, their manner of working, etc. Also the extent of plaintiff's injury, and evidence bearing on the question of damages.

Michael Graber, the manufacturer, who was called by the defendants, testified that the stills were made on Mr. O'Hara's plan, and that stills were not made so at the time of the trial; the stills were made of Lyon & Short's iron, which was the best boiler iron in the market; witness considered the iron sufficient for the size of the still; he went to examine the stills and concluded to put in angle iron to stiffen the tops and sides, so he and Mr. O'Hara thought; witness thought that the angle iron would remedy the defect, and so told Mr. O'Hara. There was other evidence on the part of the defendant in answer to the plaintiff's case.

Mr. O'Hara was not a machinist.

The defendant's 5th and 6th points, and the answers of the court were :

"5. That in cases of this kind, what amounts to negligence on part of defendant is a question of law for the court, and taking all of plaintiff's testimony to be true, with the undisputed testimony of defendant, no such act or default on part of defendant has been shown, as would warrant the court in submitting to the jury the question whether the negligence of defendant had caused or resulted in the loss and damage sustained by the plaintiff."

"Affirmed, as to negligence being a question for the court. Refused as to the balance."

"6. That taking all the testimony of plaintiff to be true, it does not make out a case of negligence on the part of defendant to warrant a verdict in favor of plaintiff."

4 Refused."

The court referred to and commented upon the evidence, and further charged: * * * "Having learned of the imperfect manner of the performance of the stills when found tested, did

or did not Mr. O'Hara do all that ought reasonably to have been required of him, in the light of facts and circumstances as they *then* existed. You must judge Mr. O'Hara by what he *then* knew, and not by what he and you know *now*. What would you have done had you been in his place, with the knowledge he then possessed? Judge him as you would have yourself judged under like circumstances and at that time. Keep to this point in all your deliberations upon the question of negligence, and do not deliberate in the blaze of this fearful baptism of fire happening afterward, which showed too truly that an accident had happened, and that the plaintiff, but for God's mercy, would not be alive to-day to tell the tale. Keeping steadily in view what he saw and what he heard before the accident, and what he did in order to make these stills perfect in performance and secure from accident, proceed to judge Mr. O'Hara, and through him the defendants, whom he represents. Were the stills sufficient in structure? Were they of proper material, properly used? If not, did the defendants do all that reasonable men should have done under the circumstances? [The plaintiff says the defendants should have taken and thrown away these stills simply because they 'surged' and 'heaved' as described by the witnesses, and so ask us to say to you as a matter of law. We will not, and do not so instruct you, but leave it to you to say, as the triers between the parties as a question of fact, what he should have done under all the circumstances. If you, upon your oaths, looking at this case in all its aspects, and putting yourselves in his position, think this was what a person of ordinary prudence and caution ought to have done, then your verdict must be for the plaintiff.] If, upon the other hand, you are of opinion that being, as is admitted, no mechanic, Mr. O'Hara, relying upon the suggestion of Schmidt and Graber, who were men admittedly competent, had a right to think that the defect could be remedied, and that he did in good faith attempt the remedies, and also did whatever any person in his condition, of his mechanical knowledge and placed in his circumstances would have done, then this is an end of the case for the plaintiff, and your verdict must be for the defendants." * * *

The verdict was for the plaintiff, for \$1,500.

The defendants took out a writ of error. They assigned

for error the answers to their points, the part of the charge in brackets, submitting to the jury to find negligence and want of ordinary care on the part of defendant, when there was no evidence to warrant such finding, and the admission of the evidence objected to.

H. BURGWIN, for plaintiffs in error.

D. W. & A. S. BELL, for defendant in error.

The opinion of the court was delivered, January 3, 1870, by SHARSWOOD, J.

The first four errors assigned are to the answers to the points and to the charge of the learned judge in the court below in this, that without any or sufficient evidence, he left it to the jury to determine whether the injury which the plaintiff below had sustained from the explosion of two oil stills in the oil refinery establishment of the defendants had resulted from their negligence.

The defendants were a corporation, and could only act through their officers or agents. It is their officer, having charge of their business, who, for all practical purposes, must be regarded as the corporation itself: *Frazier v. Pennsylvania Railroad*, 2 Wright, 104. The same rule of liability must be applied to them as to natural persons. The duty which they owe to their servants and employes is the same. What employers owe to their servants and workmen is the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and in employing with them fit and competent superintendents and fellow-workmen. Not that they warrant the result, nor that extraordinary vigilance is exacted of them. It is nevertheless true, as stated by the learned judge below in his charge, that what is due care and ordinary diligence will much depend on the kind of business which is carried on, and the sort of material which is handled. The proprietor of a powder-mill must exert more precaution than the master of a blacksmith shop. So, in such an establishment as that carried on by the defendants below—in refining oil from crude petroleum—a material highly inflam-

mable and explosive, we are bound to examine the question of negligence with a regard to this circumstance.

It may be considered as now settled, that if a person employs others, not as servants but as mechanics or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them he incurs no liability for injuries resulting to others from their negligence or want of skill: *Painter v. Pittsburg*, 10 Wright, 213. If I employ a well known and reputable machinist to construct a steam engine, and it blows up from bad materials or unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondeat superior* is the rule: *Godley v. Hagerty*, 8 Harris, 387; *Carson v. Godley*, 2 Casey, 111. There is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill; though a master is not responsible for an injury to a servant by the negligence of a fellow servant, unless he has failed in his ordinary care in the employment of the culpable party: *Ryan v. Cumberland Valley Railroad*, 11 Harris, 384; *Frazier v. Pennsylvania Railroad*, 2 Wright, 104; *Hunt v. Same*, 1 P. F. Smith, 475; *Caldwell v. Brown*, 3 Id. 453.

Applying these principles to this case, we think that the learned judge below was entirely right in submitting the question of negligence to the jury. Graber, the machinist, testified that the stills were made according to the plan of Mr. O'Hara, the president of the company defendants. When, upon trial, they were found to be defective, he says: "We concluded to put in angle iron to stiffen the tops and sides; so Mr. O'Hara and I thought." The opinion of the president, assuming to understand the subject, would naturally have great weight with the mechanic. Had he been intrusted with the work under a contract to construct stills of sufficient strength for the purpose, leaving that to his own judgment and skill, the company could not have been visited with the consequences of his failure, but such does not appear to have been the case in this instance; at least there was evidence for the jury.

The fifth assignment is that the court below erred in permitting a witness for the plaintiff to give his opinion that the iron, of which the still was composed, was not of sufficient strength. The ground of the exception is, that he was not such an expert as to make his opinion competent. He was a steam fitter at the defendants' works, and said that he had no knowledge of stills, except working with them and fitting them up, after they were put up. An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. There are some matters of which every man, with ordinary opportunities of observation, is able to form a reliable opinion: *Wilkinson v. Moseley*, 30 Ala. 562; *De Witt v. Barly*, 17 N. Y. 340. It is not necessary, as it is said in one case, to call a drover or butcher to prove the value of a cow: *Ohio Railroad Co. v. Irvin*, 27 Ill. 178. Nor is it imperatively required that the business or profession of the witness should be that which would enable him to form an opinion: *Van Deusen v. Young*, 29 Barb. 9; *Smith v. Hill*, 22 Id. 656; *Price v. Powell*, 3 N. Y. 322; *Fowler v. Middlesex*, 6 Allen, 92. In *Phillips v. Gregg*, 10 Watts, 158, witnesses, who were not lawyers by profession, were received to testify as to what constituted a lawful marriage in the settlements of the Mississippi valley half a century before. While undoubtedly it must appear that the witness has enjoyed some means of special knowledge or experience, no rule can be laid down, in the nature of things, as to the extent of it. It must be for the jury to judge of the weight to which his opinion is entitled. It was held in *Howard v. Providence*, 6 R. I. 514, that the competency of a person to give his opinion under oath as an expert, so that, upon the preliminary examination, he appears to have any pretensions to speak as such, rests very much in the discretion of the judge trying the cause. This is in accordance with our own cases of *Leazure v. Hillegas*, 7 S. & R. 313, and *Flinn v. McGonigle*, 9 W. & S. 75, where, upon a similar preliminary question of fact as to the loss of a paper before admitting parol evidence of its contents, it was said that it must be a strong case to induce this court to interfere. It follows that

we can not pronounce the admission of the evidence in this case to have been erroneous.

Judgment affirmed.

STRAHLENDORF V. ROSENTHAL.

(30 Wisconsin, 674. Supreme Court, 1872.)

Dangerous shaft—Pleading and proof—¹Immaterial variance. In an action for injuries received by plaintiff while in defendant's employ in digging a shaft, the complaint avers, as a consequence of the careless manner in which the shaft was constructed, and the neglect of defendant in not planking or properly securing the sides thereof, without any fault on plaintiff's part, that the sides of the shaft fell in upon him. It further avers that defendant, well knowing the premises and knowing the danger of said shaft to those employed therein, negligently, etc., directed plaintiff to proceed to the bottom thereof and dig there, without advising him of the danger, etc. The negligence shown by the proof was, that defendant, being aware of the existence of a fissure in the side of the shaft, at a point where it caved in, neglected to inform the plaintiff of it. *Held*, that the cause of action proven was *substantially* alleged in the complaint, or the variance did not mislead the defendant, and might be disregarded.

Usual risks assumed by employe. One who agrees to work for another in any employment takes upon himself the usual risks of such employment.

² **Idem—Dangers known only to employer.** If there exist facts known to the employer and unknown to the employe, increasing the risks of the miner beyond the ordinary hazards, the employer is bound to disclose such facts to his employe; otherwise he will be liable as for negligence in case of injury to the latter, resulting from such unusual risks.

Evidence of employer's knowledge of danger. Admissions made by defendant to several persons on different occasions, to the effect that he knew of the existence of a fissure in the walls of the shaft, before plaintiff went down, and knew it was dangerous, but thought it would hold until he got through: *Held*, sufficient evidence to justify the submission of the question of his negligence to the jury.

Idem—Contributory negligence—Question for jury. The question of contributory negligence was for the jury, and was properly submitted to them by the court.

Appeal from the Circuit Court for Winnebago County.

¹ *Litchfield Co. v. Taylor*, 10 M. R. 684.

² *Baxter v. Roberts*, 44 Cal. 187; *McGowan v. La Plata Co.*, 10 M. R. 59; *Parkhurst v. Johnson*, 50 Mich. 70.

The plaintiff was employed by the defendant in sinking a shaft for copper. When the excavation had reached a depth of something more than fifty feet, and when all but the lower twelve feet thereof was properly curbed, the plaintiff being at the bottom engaged in loading the bucket with loose earth, preparatory to curbing the lower part of the shaft, a quantity of earth from the side of the excavation and just below the curbing fell upon him, and so injured him that he will undoubtedly be crippled for life. This action was brought to recover damages for such injuries, and the plaintiff had a verdict and judgment therein for \$900. The defendant has appealed from such judgment to this court.

So much of the complaint as is necessary to be considered in determining the questions presented by this appeal is as follows :

"That this plaintiff was at the time hereinafter mentioned engaged as a servant to work for the said defendant, and that the said defendant directed this plaintiff, on the 22d day of January, A. D. 1870, to work in said shaft. That this plaintiff being unaccustomed to sinking or working in shafts, proceeded to the bottom of the said shaft, and commenced work there, not knowing that there was danger in so doing. That the said shaft was so carelessly and negligently constructed, and sunk, and by reason of the fault, neglect and carelessness of the defendant in not planking, or properly securing, the sides of said shaft, and in not taking due precaution to protect the sides thereof, and prevent them from caving or falling in, and without any fault or negligence on the part of this plaintiff, the sides of the said shaft fell into the shaft and to the bottom thereof upon this plaintiff.

That the defendant, well knowing the premises, and knowing the danger of the said shaft to those employed there, did, on the day aforesaid, negligently, carelessly and wrongfully direct this plaintiff to proceed to the bottom of said shaft and to dig and excavate therein, without advising this plaintiff of the danger thereof, or in any manner intimating to this plaintiff that there was danger in so doing, although he, at the time, well knew that the same was dangerous."

These allegations are all denied in the answer of the defendant.

The testimony tends to prove (although the same is strongly controverted) that on the occasion when the plaintiff was injured the defendant sent him down the shaft, and that the defendant had been down a short time before and saw a crack in the earth at the point from which it caved in on the plaintiff, and knew or thought that it indicated danger. It is conceded that he did not inform the plaintiff of the existence of the crack, or warn him of the supposed danger, and it conclusively appears that the plaintiff had no knowledge, before he was injured, that the earth was thus cracked.

FELKER & WEISBROD, for appellant.

FINCH & FELKER, *contra*.

LYON, J.

Several exceptions were taken during the trial, on behalf of the defendant, to the rulings of the court upon objections to testimony and to the charge given to the jury, but none of them were insisted upon by the learned counsel for the defendant, in his argument in this court, as grounds for reversing the judgment of the circuit court. It becomes unnecessary, therefore, to consider such exceptions.

It is claimed that such judgment is erroneous and should be reversed, for the following alleged reasons:

1. Because the complaint does not state the cause of action to which the testimony, introduced by the plaintiff, is directed, and upon which he relies, but sets up a different cause of action.
2. Because there was no testimony tending to prove that the plaintiff's injuries were caused by the negligence of the defendant.
3. Because the evidence shows that, by the exercise of reasonable care, the plaintiff could have discovered the danger and avoided it.

If the first of these propositions is true, unless the variance be disregarded or the complaint is amendable after judgment, or if either of the other propositions is true, the judgment of the circuit court should be reversed; but if neither of them

be true, then such judgment should be affirmed. We will consider these propositions in the order above stated.

I. It is true the complaint does not state expressly that the defendant knew of the fissure in the earth, and that the alleged negligence consisted in failing to inform the plaintiff of the fact, but it does aver that the sides of the shaft were in a dangerous condition, that they were not properly secured, and that due precautions against accidents had not been used, by means whereof the plaintiff was injured, and that the defendant, knowing the danger, sent the plaintiff to the bottom of the shaft without apprising him of the peril he thereby incurred. Although these averments might have been made more definite, it would seem that the cause of action, to which the testimony is directed, is substantially alleged in the complaint. But, however this may be, if there is any variance between the complaint and the proofs, it is very clear that the defendant has not been misled by it, and the court properly directed the fact to be found in accordance with the evidence: Tay. Stats. 1445, §§ 35 and 36.

II. The rules of law in respect to the liability of the defendant for the injuries received by the plaintiff, are elementary and may be stated in a few words. The plaintiff, when he contracted to work for the defendant in and about the sinking of the shaft, took upon himself the necessary and usual risks of that employment. But if there existed some extrinsic cause, known to the defendant and unknown to the plaintiff, which increased the hazards of such employment beyond its ordinary and usual hazards, the defendant was bound to inform the plaintiff of the fact which thus increased the perils of the work. If, therefore, the defendant knew that the shaft was in a dangerous condition and sent the plaintiff into it without informing him thereof, and if, by reason of such dangerous condition, the plaintiff, without knowledge thereof or fault on his part, was injured, the defendant is liable to respond in damages therefor. These rules have their foundation in the plainest principles of justice and sound reason. See *Baxter v. Roberts*, decided by the Supreme Court of California (5 Chicago Legal News, 41), in addition to the cases and authorities cited on this subject in the brief of the counsel for the plaintiff.

Such being the law of this case, we are next brought to inquire whether there is any testimony tending to prove, 1, that the defendant has violated any legal duty which he owed the plaintiff in respect to such employment; and 2, that, in consequence of such violation of duty, the plaintiff received the injuries of which he complains.

The testimony certainly tends to show that the earth which injured the plaintiff fell from the point where it is claimed the crack or fissure was situated, and there is enough in the testimony to authorize the jury to find, that, had the plaintiff known there was danger that the earth would cave in from that point, he could easily have avoided the injury.

It being conceded that the defendant did not inform the plaintiff of the existence of the danger, the only question left to be determined seems to be whether the testimony tended to show that the defendant knew that it existed.

The testimony which it is claimed tends to show that the defendant had previous knowledge that the side of the excavation below the curbing was in a dangerous condition, is as follows: The plaintiff testified that soon after he was injured, and when lying on a lounge in the defendant's house, he heard the defendant exclaim, "Oh, my God! I wish I had not sent you down! I have seen that it was cracked, and I knew that it was dangerous." Carl Stenzal testified that soon after the accident he heard the defendant say, "Oh! that I had told it! I have seen the crack, but thought it would still hold." This was also said in the room where the plaintiff was lying. Charles Lang testified that several days after the plaintiff was injured the defendant told him that he was in the ground on the forenoon of the day of the accident, and then saw a big crack which was loose, but that he thought it would hold until they could get the plank in; also, that defendant said that pieces of dirt from the crack fell upon the plaintiff, knocked him down and broke his leg, etc. Richard Gunther testifies that on the day of the accident, in the city of Oshkosh, where the defendant went for a surgeon, the defendant told the witness that he had been in the shaft or well a short time before the accident and had noticed a crack in the wall, but thought that it would hold and nothing would happen until he got through.

Although all of the above testimony consists of certain

statements and admissions alleged to have been made by the defendant, and although such testimony should, as the learned circuit judge very properly charged the jury, be received with great caution, still it is testimony in the case, and there is no escape from the conclusion that it tends to prove that the defendant knew, when it is claimed he sent the plaintiff into the shaft, that there was a dangerous fissure in the side thereof, which was liable to result in the caving of the earth in the vicinity of it, to a greater or less extent, at any moment. We do not say that the testimony *proves* that the defendant had such knowledge, but only that there was sufficient testimony *tending* to prove the fact to make it the duty of the court to leave the question for the decision of the jury, and this was done.

If the defendant knew of the danger and failed to inform the plaintiff of it, this was negligence on his part; the testimony therefore tends to show that he was negligent in that behalf. It follows from the views above expressed, that the objection that there is no testimony tending to prove that the plaintiff's injuries were caused by the negligence of the defendant, is not well taken. Such objection is in the nature of a demurrer to evidence, which fails if there is any testimony upon the issue proper to be considered by the jury.

III. The remaining objection taken by the counsel for the defendant is also untenable. The court can not say from the evidence that it is conclusively proved that the plaintiff was guilty of contributory negligence. That also was a question for the jury, and was properly submitted to them by the court.

After a careful consideration of the case, we are unable to perceive any error in the proceedings as regards the questions which we are asked to consider. We think that the pleadings and evidence are sufficient to support the verdict and judgment.

It follows that the judgment of the circuit court should be affirmed by the court.

By the court.

Judgment affirmed.

THE BARTLETT COAL AND MINING CO. V. ROACH ET AL.

(68 Illinois, 174. Supreme Court, 1873.)

¹**Neglect of statutory mine regulations.** Where a mining company failed to comply with the terms of the act of 1872, which required the top of each shaft to be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft, as a result of which an employe, using due care, fell into a shaft and was killed: *Held*, that the company was liable in an action on the case brought by his personal representatives.

Accident shortly after act took effect. The fact that the accident occurred only a few days after the act took effect, and before the company had time to comply with its provisions, affords no defense. If the company was not prepared to comply with the law it should have suspended operations until it was so able.

Neglect of company and that of co-employe distinguished. The failure of a company to comply with a statutory requirement which results in injury to the employe, distinguished from cases where injury is the result of negligence of a co-employe.

Appeal from the Circuit Court of St. Clair County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action on the case brought by Drury D. Roach, the father, Delphi Roach, the mother, and Cuzzy A. Roach, the sister of the deceased, against the Bartlett Coal and Mining Company, to recover damages for the death of Andrew J. Roach, caused by the neglect of duty on the part of the defendant. The plaintiffs recovered judgment for \$800 damages in the court below, and the defendant appealed.

WM. H. UNDERWOOD, for the appellant.

SNYDER & DILL, for the appellees.

SCOTT, J., delivered the opinion of the court.

The single error assigned is, the court erred in refusing to grant a new trial and in rendering judgment on the verdict.

The suit was brought to recover damages for the death of

¹ *Litchfield Co. v. Taylor*, 10 M. R. 684.

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Andrew J. Roach, alleged to have been caused by the willful failure of the company to comply with the provisions of the 8th section of the act of 1872, in regard to mines, which requires "the top of each shaft shall * * * be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft."

There can be but little doubt, in view of the evidence, that the accident would not have occurred if the top of the shaft had previously been secured, as required by the statutes, and as has since been done.

The theory of the defense rests on different grounds. In the first place, it is suggested, the clause of the statute under which the action was brought was probably designed to protect third persons and stock from injury in open mines. We can not adopt this construction. The title itself expresses the beneficent purpose the legislature had in view in the passage of the law, viz.: to provide "for the health and safety of persons employed in coal mines."

The law went into force on the 1st day of July, 1872, and the accident occurred on the 9th day of the same month, and it is urged no adequate time had elapsed in which the company by the exercise of reasonable diligence, could have complied with its provisions.

This was purely a question of fact, and the jury has found it against the company. But the objection is untenable for another reason: The appellant will be presumed to have known when the law took effect, and if the company was not prepared to comply with its provisions, it was its duty to suspend operations in the mines until the necessary preparations could be made, and its failure to do so must be regarded as willful. The company continued to operate its mines in defiance of the law and must bear the consequences.

It is also insisted, the deceased was guilty of such negligence as would prevent a recovery. We perceive no want of ordinary care in his conduct. The only negligence proven is in pushing the box in the wrong direction. It was quite common for employes to do the same thing. It was done in this instance that he might load the car more evenly, and thus do the work of his employe better. At most it was a mere indiscretion on his part. The very object to be attained by the

law was, to prevent injuries to persons so employed, that the slightest degree of negligence might not prove fatal. It is shown conclusively by the evidence, that if the gates had been in position the accident would not have happened, notwithstanding the manner in which he did his work.

The injury was not occasioned by the negligence of a fellow servant, as suggested by counsel. It was caused by the failure of the company to comply with the provisions of the law. The neglect was that of the company itself, for which it must be held responsible ; and hence the principle of law invoked, that one servant can not recover against the common employer, for an injury caused by a fellow servant in the same line of employment can have no application to the facts of this case.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

THE LITCHFIELD COAL CO. v. TAYLOR.

(81 Illinois, 590. Supreme Court, 1876.)

¹ **Widow substituted for administratrix as plaintiff.** An action to recover damages for the death of a miner, caused by neglect to observe the provisions of the statute relating to miners, is properly brought by the widow of the deceased. The action is given to the widow and not to the personal representative.

Amendment changing office of plaintiff. The court may allow a declaration brought in the name of plaintiff, as administratrix, to be amended showing that she declares as widow of the deceased.

Statutory regulation for the protection of miners—Fall of coal—Immaterial variance. Chapter 93, Revised Statutes of Illinois, 1874, prohibits the use of uncovered cages for the purpose of conveying miners into or out of the mine, and also the hoisting of coal at the same time that miners are being hoisted. In a suit by the widow of a miner killed by a lump of coal falling down the shaft, the declaration alleged that the defendant was hoisting coal out of a shaft in its mine at the time the deceased was ascending, and that he was killed in consequence of that unlawful act, while the proof showed that he had just got upon the cage to be raised, when he was killed by the fall of coal: *Held*, that there was no material variance as the danger was as great as if the cage was in fact ascending at the time.

¹ *Delaware Co. v. Carroll*, 10 M. R. 47.

¹ **Alleged variance—Attempt to escape after warning.** Upon a count alleging death as the result of there being no cover to the cage, while deceased was on the cage, where the proof showed that immediately after the accident he was found lying on his back, off the cage, with his feet about six inches from it, it was *held*, that as a matter of fact this evidence did not prove that he was off the cage when struck, but that even if he was in the act of getting off the cage upon the alarm given that the coal which killed him was falling, such fact would not constitute a variance between the averment and the proof.

² **Willful injury excuses contributory negligence.** Where death to a miner has resulted from the willful conduct of a company in failing to use a covered cage, in known violation of the plain requirement of the statute, a verdict against the defendant is justified, although the deceased may not have been entirely free from fault.

Facts not amounting to contributory negligence. The fact that deceased may have been heard to say in conversation with strangers, that he preferred to be hoisted in an uncovered cage, or the fact that he went on the cage before the signal was given, when the man in charge of the cage had made no remonstrance, and the deceased and his comrades supposed the signal had been given, do not show that the misconduct of the deceased materially contributed to the injury.

Appeal from the Circuit Court of Montgomery County ;
the Hon. HORATIO M. VANDEVEER, Judge, presiding.

'RICE & MILLER, and E. SOUTHWORTH, for the appellant.

R. M. WILLIAMS and E. LANE, for appellee.

CRAIG, J., delivered the opinion of the court.

This was an action brought by Mary A. Taylor, widow of James Taylor, deceased, against the Litchfield Coal Company, to recover damages for an injury received by the deceased, resulting in his death, alleged to have been caused by the willful conduct of the defendant in using uncovered cages for the purpose of conveying the miners into and out of the mine, and in hoisting coal from the mine at the same time the miners were being hoisted from the mine, in violation of the provisions of chapter 93, entitled "Miners." Rev. Stat. of 1874, p. 704.

A trial of the cause before a jury resulted in a verdict in favor of the plaintiff for \$1,500. The court overruled a motion for a new trial, and rendered judgment upon the ver-

¹ *Strahlendorf v. Rosenthal*, 10 M. R. 676.

² *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; 30 Am. R. 185.

dict, to reverse which the defendant has taken this appeal. In the commencement of the action appellee sued as administratrix of the estate of James Taylor, deceased. Subsequently, on motion, the court allowed the summons and declaration to be amended so that the action might proceed in the name of appellee as widow of the deceased. This amendment is assigned as error. We are satisfied the widow was the proper person to bring the action. The 14th section of the act expressly authorizes her to bring the suit. Chapter 70, entitled "Injuries," R. L. 1874, p. 582, which authorizes an action in the name of the personal representatives, did not repeal the 14th section of the act entitled "Miners." The former act is general, while the act in relation to miners may be regarded as special, and the latter must control as to all cases specially enumerated in the act itself, while the other act, being general, would embrace all other cases: *Ottawa v. La Salle*, 12 Ill. 339.

In regard to the extent of the amendment, there can be no doubt but the court had ample power under the liberal provisions of section 24 of the Practice Act: *Teutonia Ins. Co. v. Mueller*, 77 Ill. 22. Nor was the amendment ground for a continuance unless application had been made in the manner provided by section 26 of the Practice Act, supported by affidavit. That was not, however, done, and the decision of the court overruling the motion for a continuance was proper.

In the first count of the declaration it was averred that appellant hoisted coal from its mine at the time Taylor was ascending, and the deceased was killed in consequence of that illegal act of the company.

The court was requested by appellant to instruct the jury that there was no evidence before them upon the first count of the declaration. This was refused, and at the request of appellee the following was given: "The court instructs the jury, for the plaintiff, that the defendant could not lawfully hoist any coal out of its mine while persons are ascending out of or descending into its said mine, and if the jury believe from the evidence that James Taylor was an employe of defendant in said mine, and that the defendant willfully undertook to hoist said Taylor out of its mine while it was hoisting coal out of

said mine, and that thereby the said James Taylor was killed, the jury will find the defendant guilty on the first count of the declaration, if they find from the evidence that the plaintiff is the widow of said deceased."

The appellant claims that the record contains no evidence upon which the instruction can be predicated. We do not so understand the testimony. The evidence introduced tends to prove that the box of coal appellant was hoisting from the mine when the accident occurred was not entirely up when the person in charge of the cage permitted the miners in the mine to go upon the cage for the purpose of being hoisted. James Reeves, in his evidence, says: "The men did not have hold of the box when the coal rolled off. As the top of the coal came through the 'catches' the coal was raked off." When this occurred the miners were upon the cage. They supposed the signal had been given for them to go upon it, and the person in charge of the cage must have so understood it himself, or he would not have allowed them to go upon it. It is true, the cage had not commenced to go up when the accident occurred, but it was in the act of starting, and the danger proved to be as great as if it had been advancing at the time.

We are satisfied the facts proved were sufficient to justify the submission of the question presented by the instruction to the jury.

In the second count of the declaration it is in substance averred that appellant willfully used in its mine uncovered cages, to hoist out and lower into the mine the persons employed to work therein, and that the deceased had gone upon an uncovered cage of the company for the purpose of being hoisted out of the mine, and that while upon the cage for the purpose of being hoisted a lump of coal fell upon the shaft striking the deceased upon the head, which resulted in his death, by reason of the cover being, at the time, off the cage. It is urged by appellant that the proof does not correspond with the averments of the declaration, and hence it was error to give appellee's third instruction, which was predicated upon the evidence introduced under the second count. We have examined the proof with care, and fail to find any substantial variance between the evidence introduced and the declaration.

But it is said Taylor was not on the cage when struck. The proof is, however, clear and explicit, that the deceased went upon the cage, and was on it with the other miners when the alarm was given that the coal that produced his death was descending the shaft. It is true, in the confusion and alarm among the miners, no one saw the deceased at the moment he was struck or when he fell, but he was found immediately after he received the fatal blow, lying on his back with his feet some six inches off the cage. The position in which he was found was not inconsistent with the theory that he was on the cage when struck; but even if he was in the act of getting off the cage when he received the blow, such fact would not constitute a variance between the averment in the declaration and the evidence.

The next ground of error relied upon by appellant is the giving by the court of appellee's instruction No. 5, as follows:

"That if the jury believe, from the evidence, that the defendant willfully used an uncovered cage in its mine, for hoisting purposes, and that James Taylor was on such uncovered cage to be hoisted out of such mine, and because of such cage being uncovered the said James Taylor received injuries, from which injuries he died, the jury will find the defendant guilty, provided they shall further believe that the plaintiff was the wife, and now is the widow, of said deceased."

The objection taken to the instruction is, that it excludes from the consideration of the jury the negligence of the deceased, which may have contributed to the injury.

The sixth section of the act required appellant to provide a safe means of hoisting and lowering persons at the mines, with a sufficient cover overhead on every box or carriage used for hoisting purposes, for the protection of persons hoisted or lowered into the mines. The fourteenth section declares: "For any injury to person or property occasioned by any willful violations of this act or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby."

Where an action is brought to recover for an injury resulting from the negligence of another, which was not wanton or willful, it is an essential element to a recovery that the plaintiff or party injured must have exercised ordinary care to avoid

the injury; but, as we understand the authorities, where the injury has been willfully inflicted an action may be maintained, although the plaintiff or party injured may not have been free from negligence.

In *Tonawanda R. R. v. Munger*, 5 Denio, 255, it is said: "A horse straying into a field falls into a pit left open and unguarded; the owner of the animal can not complain, for, as to all trespassers, the owner of the field had a right to leave the pit as he pleased, and they can not impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief; although it may be cogent evidence of such an act. Of the latter a trespasser may complain, although he can not be allowed to do so in regard to the former." See, also, *Shearman & Redfield on Negligence*, Sec. 37; *Sanford v. Eighth Avenue R. R.*, 23 N. Y. 343.

In *Illinois Cent. R. R. v. Godfrey*, 71 Ill. 500, it was held by this court, notwithstanding the plaintiff was unlawfully upon the defendant's right of way, or not in the exercise of a legal right, and that his own lack of ordinary care exposed him to the risk of injury, yet the defendant might not, with impunity, wantonly or willfully injure him.

In the *C., B. & Q. Railroad v. Lee*, 68 Ill. 576, it was said, the cases all go to the length of holding, where a party has been injured for the want of ordinary care, no action will lie, unless the injury is willfully inflicted by the defendant.

In the case under consideration it was the willful conduct of the coal company of which the plaintiff complained, and while the deceased may not have been entirely free from fault, yet, if the jury found from the evidence that the willful conduct of appellant resulted in the injury, the verdict would be justified. If we are correct in this view of the subject, the instruction may be regarded in substance correct. But even if the instruction was faulty, as claimed by appellant when the other instructions are considered, it is unreasonable to believe that the jury was misled. The other instructions given for appellee require the jury to find that deceased was in the

exercise of due care; and in the third instruction given for appellant the jury were directed that if they believed from the evidence the said Taylor did not exercise due care, and that his death would not have happened but for his own negligence, they should find for the defendant. Nor does the evidence justify the theory that the misconduct of the deceased materially contributed to the injury. His unguarded statements made to strangers to the company, that he preferred to be hoisted in an uncovered cage, formed no sufficient excuse for appellant to knowingly violate the plain requirement of the statute. It is said the deceased went upon the cage before the proper signal was given, but he had nothing to do with the signals. The cage was in charge of a person to whom the signal was given for the miners to enter the cage, and it is not reasonable to believe that he would have permitted the miners to enter the cage until after the proper signal was received. The fact is, the deceased, in company with the other miners, supposed the signal had been given, and entered the cage without objection or remonstrance from the person who had charge of it. If there was fault anywhere, it was with the man in charge of the cage and not on the part of the deceased.

So far as appears from the record a fair trial was had, and we perceive no reason for disturbing the judgment, and it will be affirmed.

Judgment affirmed.

JOCH V. DANKWARDT, FOR USE, ETC.

(85 Illinois, 331. Supreme Court, 1877.)

Competency of engineer, a question of fact. In an action for injuries caused to a miner while being lowered into a mine, it is error for the court to instruct the jury that the employment of a person as engineer who has always been a laborer or a mule driver, raises a presumption of negligence. What constitutes negligence in the employment of an incompetent engineer is entirely a question of fact for the jury. The court should only lay down the law as to the liability of the defendant in case of such negligence, without intimating any opinion in regard to the force of the evidence.

¹ **Mental suffering as element of damage.** It is improper to allow compensation for mental suffering as a distinct element of damage, in addition to bodily suffering, in a suit for physical injuries.

Error to the Circuit Court of Washington County, the Hon. AMOS WATTS, Judge, presiding.

WILLIAM WINKLEMAN, for the plaintiff in error.

C. W. & E. L. THOMAS, for the defendant in error.

SHELDON, J., delivered the opinion of the court.

This was a suit to recover damages for injuries sustained by the plaintiff, a coal miner, in being lowered into a coal mine of the defendant, in whose employ he was mining coal. A recovery was had by the plaintiff, and the defendant appealed.

The giving of two instructions for the plaintiff is assigned for error. The instructions were:

"The court instructs the jury, that proof of the employment of one who had always been a manual laborer or a mule driver, to run a steam engine, raises a presumption of negligence of the master, without showing that he had actual notice of the servant's antecedents, if you believe from the evidence that such laborer had been employed and was in charge when plaintiff received the injuries complained of in this suit."

"The court instructs the jury that if they find for the plaintiff, he, as the party aggrieved, is entitled to recover, not only for actual expenses, including medical attendance, but also a reasonable compensation for mental and bodily suffering, loss of time, and for any permanent or incurable injury sustained by him, if you believe any has been proved."

The occasion of the injury was in being precipitated to the bottom of the mine while being lowered into it in a cage containing the plaintiff and some others, which was operated by means of a steam engine and machinery which one Schaffer had the charge of, as engineer; and it was claimed that the accident occurred in consequence of his negligent mismanagement as the engineer.

¹ *Wright v. Compton*, 2 M. R. 189.

The testimony affording the basis for the first instruction was to the effect that Schaffer, before he became engineer, was a laborer and drove mules in the mine; that defendant's sons taught him to run the engine; that he had only worked at defendant's mine four or five, or at most, six months.

The first instruction was manifestly erroneous; what constituted negligence in the employment of an incompetent engineer was entirely a question of fact for the jury, and it was error for the court to instruct that the fact named in the instruction raised a presumption of negligence. What time or training is requisite to make one a competent engineer is no question of law, but one of fact solely. The court should have only laid down the rule of law as to the liability of the defendant in case of negligence in the employment of an incompetent engineer, without intimating any opinion in regard to the force of the evidence as showing such negligence. The instruction was calculated to do harm to the defendant, and in view of the evidence we must consider that the instruction probably influenced the finding of the verdict against him.

The other instruction, too, was improper in allowing compensation for mental suffering, as a distinct element of damage in addition to bodily suffering.

The judgment will be reversed and the cause remanded.

Judgment reversed.

BROWN ET AL. V. TORRENCE.

(88 Pennsylvania State, 186. Supreme Court, 1878.)

¹ **Subsidence of land—² Smoke from coke ovens.** Where land is injured by negligence in mining coal underneath it, or the crops and vegetation thereon are injured by the heat and smoke from coke ovens, the owner is entitled to a verdict for such damages as the jury believe from the evidence he has thereby sustained.

Maxim "sic utere, etc.," applied. Without a contract or some relation of privity as to the use to be made of land sold, the vendee stands to his vendor just as he does to others, and the maxim applies *sic utere tuo ut alienum non lædas*.

Error to the Common Pleas of Fayette County.

¹ *Hodgson v. Moulson*, 8 M. R. 511.

² *Tipping v. St. Helen's Co.*, 11 M. R. 43.

Case, by David M. Torrence against Samuel S. Brown, impleaded with J. M. Schoonmaker, administrator of the estate of William H. Brown, deceased.

At the trial, before WILLSON, P. J., it appeared that on the 14th day of June, 1870, John K. Ewing sold and conveyed to David M. Torrence the surface of a tract of land situate in Tyrone township, Fayette county, containing ninety-eight acres, for \$7,000. Prior to this, in 1867, Ewing had sold the coal underlying this surface to William H. Brown, deceased, one of whose administrators is plaintiff in error. Before the sale by Ewing to Torrence, William H. Brown had erected coke ovens on a portion of the surface sold from the original tract of which the Torrence purchase was a part, and was engaged in the manufacture of coke at the time of the sale by Ewing to Torrence, using coal from under the Torrence surface. On the 14th day of June, 1870, David M. Torrence conveyed to John M. Cochran five acres and fifty-eight perches from the western part of his land, for the purpose, as the plaintiff in error alleged, of erecting coke ovens thereon to be used in the manufacture of coke. For this he received \$200 per acre. These five acres and fifty-eight perches John M. Cochran subsequently conveyed to Brown & Cochran, a firm of which the said William H. Brown was a member. Between two and three hundred coke ovens were erected by Brown & Cochran on these five acres, in 1871 and 1872, and they have since been almost continually used in the manufacture of coke. The first mentioned ovens and improvement are known as Sterling Mines, the latter as the Jintown Works.

Torrence brought this action for damages for alleged injury by the cracking and sinking of the surface of his land, by the mining of the coal underneath it, and the loss thereby of a surface stream; for the pollution of Hickman run, above his land, by the sulphur water from the pit's mouth, and by the ether and refuse from the ovens on the five-acre tract, and for the injury to all vegetation upon his farm by the smoke, gas, and heat from the ovens at both Sterling Mines and Jintown Works.

The plaintiff, *inter alia*, submitted the following points, to which are appended the answers of the court:

3. That if the jury believe from the evidence that defend-

ants' intestate mined the coal under plaintiff's land, and removed the same, without leaving proper and sufficient ribs or pillars to support the surface, or, in lieu of ribs and pillars, set up posts or other supports of insufficient number and strength to support said surface, in consequence of which said surface fell in, cracked and sunk, to the damage thereof and of the other property of plaintiff, then the plaintiff is entitled to a verdict for such damages as the jury believe, from the evidence, he has sustained, not only in the injury to land actually fallen, sunken or cracked, but the effect thereof upon the whole of plaintiff's land. Ans. "Affirmed."

6. That if the jury believe, from the evidence, that the water of Hickman run, where it passes over plaintiff's land, has been corrupted, fouled and polluted, and rendered unfit for use, by reason of the water, ashes, dirt, etc., from defendants' intestate's mines and coke works being discharged and emptied into said run, then the plaintiff is entitled to recover damages therefor to such an amount as the jury believe from the evidence said plaintiff has sustained.

Ans. "If defendants' intestate polluted Hickman run, the plaintiff is entitled to recover at least *nominal* damages; and if there is any evidence showing *specific* damages with reference to the injury done plaintiff by defendants' intestate polluting that run, then the plaintiff would be entitled to *more* than nominal damages."

7. That if the jury believe, from the evidence, that the land or crops of said plaintiff, or any portion thereof, have been injured by the heat, smoke or dirt from the coke ovens of the defendants' intestate, the plaintiff is entitled to a verdict for such damages as the jury believe from the evidence he has sustained thereby. Ans. "Affirmed."

Defendants' sixth point, which the court refused, was as follows:

That if plaintiff's vendor, before the sale to plaintiff, had sold a part of his land and the coal under the residue to the defendants' intestate, and if at that time there were some coke ovens in use on that part of the land so sold, and the defendants' intestate had erected others before the sale to plaintiff, and was then using them in the making of coke, the plaintiff can not recover in this action for any dam-

age done to his land by the smoke and heat caused by the continued use of said ovens in an ordinary and proper manner.

Verdict for plaintiff for \$1,150, and after judgment thereon defendants took this writ, assigning for error, *inter alia*, the answers to the foregoing points.

WILLIAM H. PLAYFORD and CHARLES E. BOYLE, for plaintiffs in error.—We contend that Torrence had no right to recover for injury done his crops and fruit trees, by the smoke produced by the manufacture of coke from coal sold from under his land for that purpose by his vendor, and with the business actually going on at the time of his purchase.

[Chief Justice AGNEW.—Do you mean to say that when he bought he had notice that the coke was to be burned?]

We say that the coke was being burned when he bought, and he did so with his eyes open.

[Chief Justice AGNEW.—Was there any evidence to sustain the seventh point?]

There was.

In *Sanderson v. Pennsylvania Coal Co.*, 5 Norris, 401, this court laid considerable stress on the fact that Sanderson, *before he purchased* the tract of land, traced Meadow Brook to its source, and that its purity was one of the inducements to his purchase. This was several years before the establishment of the colliery from which the water came that polluted Meadow Brook. In the language of the opinion in this case, is not the one at bar exceptional in its surroundings and facts? From necessity must not the principles of that case be relaxed? In our case the coal was sold out before Torrence purchased, to be mined. To mine it, was to discharge the sulphur water held by the coal; if the right to discharge it was an incident to the grant, the natural flow of it after it left the pit's mouth could work no injury making Brown & Cochran answerable in damages.

NATHANIEL EWING, for defendant in error.—We claim that if defendants wish to carry on this business, they must either purchase the adjoining lands or pay for the privilege of carrying it on, to the land owner; and to sustain this position we rely upon the following authorities: *Richards' Appeal*, 7

P. F. Smith, 113; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; Bainbridge on Mines, § 468; *Smith v. Phillips*, 8 Phila. 10, and cases there cited; *Sanderson v. Pennsylvania Coal Co.*, *supra*.

[Justice SHARSWOOD.—There is nothing in the testimony here to show the nature of the damage done?]

We claim that the vegetation on seven or eight acres near the mine was destroyed, as well as the trees, by the heat and sulphurous smoke.

PER CURIAM.—The verdict of the jury establishes the fact that the surface of the plaintiff's land was injured by the negligence of the defendants' intestate in mining the coal underneath, and that the grass and vegetation have been injured by the deleterious gases thrown off from the coke ovens of the defendants. It does not appear from the evidence that the plaintiff stood in any relation of contract or of privity to justify these injuries. The mere fact that one man sells land to another can not of itself justify any use the vendee afterward chooses to apply his land to. He stands to his vendor without a contract, or some relation of privity, just as he does to others, and the maxim applies *sic utere tuo ut alienum non lædas*.

Judgment affirmed.

LIVINGSTON V. MOINGONA COAL CO.

(49 Iowa, 369. Supreme Court, 1878.)

¹ **Coal owner required to leave pillars although released from injuries resulting from mining.** One who conveys land to another reserving the right to remove the underlying coal, is bound to exercise ordinary care in the removal, and if necessary to leave pillars or ribs of coal to support the surface of the soil, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations.

Action of damages for injury to land by mining for coal. The opinion states the case. The plaintiff had judgment below.

¹ *Contra*, *Buchanan v. Andrew*, L. R., 2 Sc. App. 286; 5 Moak, 125; *Smith v. Darby*, L. R., 7 Q. B. 716; *Post* SURFACE SUPPORT.

I. N. KIDDER, for appellant.

HULL & RAMSEY and BARCROFT, GIVEN & DRABELLE, for appellee.

BECK, J.

I. One count of the petition charges that defendant negligently removed the coal from the mines under plaintiff's premises without making or leaving sufficient supports to uphold the earth above the coal, and by reason of such want of care the surface was broken up and defendant's house was injured. Other counts charge that defendant, without authority, removed the coal lying under the surface of the premises of plaintiff and of the streets adjacent thereto.

The answer alleges that the plaintiff is not the absolute owner of the premises, but that his ownership is derived through a deed wherein the right to mine coal and to remove it is reserved in defendant, and, quoting the language of the answer, "that the mining and removing said coal was done in the most careful and in the best manner, and in a way to cause the least injury to the property of plaintiff and the surface of said premises. That any injury, if any, to said property, was altogether unavoidable and could not have been foreseen or provided against by this defendant, and that this defendant used great care in and about all it did in the removal and mining of said coal. And defendant further says that in accepting said deed said plaintiff expressly released, and held this defendant harmless for the pretended injuries and matters for which he claims damages in his petition."

II. The only question discussed in the argument of defendant's counsel involves the correctness of the instructions given by the court below to the jury which relate to the obligation resting upon defendant to exercise care in mining the coal.

The deed from defendant under which plaintiff claims title to the premises contains a reservation of the right to mine coal in the following language: "And reserving, also, to said first party, his heirs, successors and assigns, all coal, coal mines, mineral products and oil beneath the surface of and belonging to said premises, with full and sole right to mine and obtain

and remove the same by such means as they deem proper, without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products and oils and removing the same, provided the said first party shall not enter on the surface of said lands."

The court in two instructions directed the jury that defendant, by virtue of the reservation in the deed, has the right to remove the coal, provided it be not negligently done, and that to entitle plaintiff to recover he must show that the mining was negligently done and the plaintiff sustained injury thereby. No objections are made to these instructions. The following instruction upon the subject of the care to be used by defendant was given the jury:

"10. Further, if you find that ordinary care and prudence would have required the leaving of pillars or ribs of coal when only artificial supports were substituted, or if the supports were left or placed further apart than was reasonably necessary to support the plaintiff's premises, keeping in view the question of ordinary care in so doing, it was negligence in the defendant in not leaving such pillars or ribs, or in not substituting more artificial supports in place of the coal removed; and if the plaintiff's premises were injured by reason of such failure he may recover therefor."

It is not claimed that this instruction was not applicable to the evidence, but defendant insists it presents incorrect rules of law. Other instructions were excepted to, but are not discussed in the argument of counsel. We are not called upon to consider them.

III. Counsel for defendant relies in argument upon objection to the instruction just quoted, based upon the ground that under it defendant has not the right to remove all the coal. The rule of this instruction, so far as it is applied to the subject of "pillars or ribs of coal" to support the surface, is this: If ordinary prudence required such pillars, defendant was negligent in not leaving them.

The rule presented in other instructions, which defendant's counsel himself pronounces correct, is that defendant is liable for injury sustained by plaintiff from the negligence of defendant in removing the coal; that defendant was bound in

working the mine to the exercise of ordinary care. There is no dispute as to the correctness of this rule. The instruction above quoted, which is assailed by defendant, directs the jury, that if they find ordinary care required pillars of coal, defendant is liable, if they were not left in mining. What constituted ordinary care was thus properly left to the jury, under the issues in the case, the plaintiff charging negligence on the part of defendant, while it alleged the exercise of due care.

An instruction given to the jury announced the rule, which is not doubted by defendant, that "plaintiff had the right to occupy the surface of the land, and the defendant to mine the coal, each using his property so as not unreasonably to interfere with the other's right." If, for the reason that pillars were not left, but all the coal was removed, it should be found that plaintiff's property was destroyed, it would follow that the failure to leave pillars would amount to an interference with plaintiff's rights for which defendant would be liable. It follows, therefore, that defendant can remove no more coal than is reasonably consistent with the preservation of plaintiff's rights. If the surface of the land may be preserved by substituting artificial supports, of course the coal may all be removed.

Counsel for defendant relies upon *Rowbotham v. Wilson*, 8 H. L. Cas. 348; 6 Ell. and Black. 593; and *Aspden v. Seddon*, 10 L. R. Ch. App. 394, to support the proposition that defendant has the right to remove all the coal and can not be held liable for negligence in not leaving pillars for the support of the surface. We think these cases have not the force claimed for them. In neither of them was any question raised as to the care to be used by the miners. In the first case it is held that the mine could be worked, though the surface was thereby rendered "uneven and less commodious to the occupiers." It does not appear that the surface could have been protected by any manner of mining.

The last case was brought to restrain defendants from working a mine, on the ground that plaintiff's buildings were in danger of destruction therefrom. It was held that the owner of the mine had the right, under the terms of the grant of land to the plaintiff, to take all the coal, upon paying

compensation to the surface owner for any damage he thereby sustained. The restraining order was refused on this ground.

We discover no grounds for disturbing the judgment of the court below. It is therefore

Affirmed.

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ACCIDENT.

1. *Accident shortly after act took effect.*—The fact that the accident occurred only a few days after the act took effect, and before the company had time to comply with its provisions, affords no defense. If the company was not prepared to comply with the law, it should have suspended operations until it was so able. *Bartlett Coal Co. v. Roach*, 682

2. *Statutory regulation for the protection of miners—Fall of coal—Immaterial variance.*—Chapter 93. Revised Statutes of Illinois, 1874, prohibits the use of uncovered cages for the purpose of conveying miners into or out of the mine, and also the hoisting of coal at the same time that miners are being hoisted. In a suit by the widow of a miner killed by a lump of coal falling down the shaft, the declaration alleged that the defendant was hoisting coal out of a shaft in its mine at the time the deceased was ascending, and that he was killed in consequence of that unlawful act, while the proof showed that he had just got upon the cage to be raised, when he was killed by the fall of coal: *Held*, that there was no material variance, as the danger was as great as if the cage was in fact ascending at the time. *Litchfield Co. v. Taylor*, 684

See NEGLIGENCE.

ACCOUNT.

1. *No account in favor of party out of possession.*—Courts will not decree an account in favor of an owner out of possession until he recovers by law. *Logan v. Green*, 322

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ADMISSIONS—See AGENT, 3; ESTOPPEL, 2; NEGLIGENCE, 35.

AGENT.

1. *Contract by agent, not disclosing his principal.*—If an agent make a contract in his own name without disclosing his principal, the principal, even if unknown to the contractor, is bound and liable for damages on a breach. *Youghiogheny Co. v. Smith*, 139

2. *Idem.*—By contracting in his own name the agent only adds his personal obligation to that of his principal. *Id.*

3. *Unauthorized declarations of agent; not evidence.*—S. was acting for an iron company in carrying on their work at their ore bank, and an offer was made to prove a statement he had made to ore miners in refer-

AGENT. *Continued.*

ence to the cost of mining the ore per ton: *Held*, that this declaration was not within the scope of his authority as superintendent, and was incompetent. *Hanover Co. v. Ashland Co.*, 205

4. *Acts of employe of surveyor certified as official.*—A statute requiring surveys for purposes of settlement to be made by the county surveyor is sufficiently complied with if made by a person in his employ and certified as his official act. *Robinson v. Imperial Co.*, 370

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AMENDMENT.

1. *Amendment changing office of plaintiff.*—The court may allow a declaration brought in the name of plaintiff, as administratrix, to be amended showing that she declares as widow of the deceased. *Litchfield Co. v. Taylor*, 684

See PARTIES, 1, 2.

APPEAL.

1. *Modification of judgment on appeal.*—Plaintiff, holding a judgment for money damages, awarded upon untenable grounds, together with decree for specific relief, allowed to remit the damages; and, thus modified, the judgment was permitted to stand. *De Costa v. Massachusetts Co.*, 94

2. *No showing that statement contains all the evidence.*—If there is no showing that a statement on appeal contains all the evidence on any fact involved in the case, it will be concluded that every fact essential to make out the respondent's case was sufficiently proven. *Bowker v. Goodwin*, 149

3. *Findings not preserved in record.*—Findings not embodied in a statement properly certified will not be considered on appeal. *Id.*

4. *Conflict of evidence as to collateral facts.*—The rule that the findings of a *nisi prius* court will not be disturbed on appeal, where there is a conflict of evidence, applies also to collateral facts. *Id.*

APPROPRIATION—See MILL SITE, 3.

ASSIGNMENT—See RECORD, 2; MERGER, 4.

ATTORNEY AT LAW.

1. *Champertous contract not preventing recovery.*—Plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of his suit to recover certain coal mines, upon being indemnified against costs: *Held*, that the contract amounted to champerty and maintenance, but that the plaintiff was not disqualified from suing where his title was vested in him before he entered into such contract. A decree was therefore made in his favor, but without costs. *Hilton v. Woods*, 110

2. *If the solicitor had sued* in such case upon a title derived under such a contract, the bill would have been dismissed. *Id.*

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BOUNDARIES.

1. *Negligence in ascertaining boundary.*—Defendants who have the

BOUNDARIES. *Continued.*

means of ascertaining the exact boundaries of their mining claim, and who work across such boundaries in ignorance of their location, are guilty of negligence. *Maye v. Yappen*, 101

2. *Proof of knowledge of boundaries.*—The plaintiff offered to prove by a witness that he was the boss miner of the defendants, a coal company, and that as such he considered it his duty to know the boundaries of defendant's property; that while superintending the cutting of timber on the company property for use in the mines, the defendants' general superintendent pointed out to him the division fence between the property of plaintiffs and defendants. *Held*, that the evidence was admissible for the purpose of showing knowledge on the part of the defendant of the lines of its property. *Franklin Co. v. McMillan*, 224

3. *Surveyor's notes of processioners—Evidence excluded.*—The testimony of a witness taken down by a surveyor while making a survey, and returned in his book of explanation, was not allowed to be read in evidence, though the witness was shown to be seventy-five years of age and in feeble health. *Id.*

See ESTOPPEL, 1; MEASURE OF DAMAGES, 16, 71-73.

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1. *Covenants construed as conditions.*—The right of re-entry being attached to covenants gives them the force of conditions. *Chamberlain v. Parker*, 145

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CONTRACT.

1. *One contract on two pieces of paper—Stamp.*—A promissory note and an agreement executed at the same time and relating to the same subject-matter, though on separate pieces of paper, constitute but one transaction, and they require only the necessary stamps for one contract, and both may be admitted in evidence, though all the stamps are on one of the pieces. *Burker v. Goodwin*, 149

See AGENT, 1, 2; LEASE, 5; DELIVERY, 1; MEASURE OF DAMAGES, 32-34, 35, 42-45, 74.

CONVEYANCE.

1. *Deed by appropriators of town site.*—A corporation had a tract of land surveyed for a town site which embraced certain land claimed by B. and E., to whom the corporation relinquished the conflicting area: *Held*, in a controversy relating to the tract claimed by B. and E., that a deed from the corporation for such tract conveyed no title: 1, because it never claimed it, and 2, because it never made such improvements on the tract as to constitute possession. *Robinson v. Imperial Co.*, 370

2. *Conveyance of mining claim by parol.*—The actual transfer of the possession of a mining claim followed by actual occupation by the transferee conveyed a good title in early days in Nevada, and this old rule will not be disturbed. *Kinney v. Consolidated Va. Co.*, 459

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3. *Utah Statute of Conveyances.*—The Statute of Conveyances of Jan. 18, 1855, Territory of Utah, did not apply to mining claims. *Id.*

4. *Quitclaim deed conveys legal title—Protects bona fide purchaser.* A quitclaim deed conveys whatever interest the grantor has in the property at the time the conveyance is made, and, although it is intended as a mortgage, it will, if absolute in form, vest the legal title in the grantee, and is sufficient to protect the rights of an innocent purchaser for value. *Brophy Co. v. Brophy & Dale Co.*, 602

See DESCRIPTION, 1, 2; FRAUD, 1; MISTAKE, 10; MORTGAGE, 5, 8, 9.

CORPORATIONS.

1. *Corporate existence, how tested.*—The regularity of the organization of a corporation can not be questioned in a collateral way. If franchises not granted by statute have been usurped, the inquiry must be made by a direct proceeding to seize the franchises to the people and dissolve the corporation. *Meeker v. Chicago Steel Co.*, 203

2. *Constitutional construction.*—Section 1, of article 11 of the constitution of 1870, construed as not repealing the general law on the subject of private corporations previously in force in Illinois. *Id.*

See MORTGAGE, 21, 23; NEGLIGENCE, 27, 28; STATUTE OF LIMITATIONS, 2.

COSTS.

1. *Statute authorizing insertion of costs in judgment.*—The legislature of California, in 1861, amended Sec. 511, thereby authorizing the clerk to insert the amount of the costs within two days after they shall have been taxed or ascertained in a blank left for that purpose in the record. *Antoine Co. v. Ridge Co.*, 97

2. *Insufficient suspensory offer—Costs.*—The solicitors of defendant wrote to the plaintiff's solicitors that they were prepared to advise defendant to settle on certain terms. *Held*, that this was not such an offer as would free the defendant from liability to the subsequent costs of the action inasmuch as he might have refused to follow the advice of his solicitors. *Trotter v. Maclean*, 264

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DELIVERY.

1. *Constructive delivery.*—In order to substitute an arrangement between parties for a manual delivery of a parcel of property, mixed with an ascertained larger quantity, the portion sold must be so clearly defined that the purchaser can take it, or maintain replevin for it. *Foot v. Marsh*, 185

DESCRIPTION.

1. *Description in mortgage—Parol identification.*—A mortgage in which the mortgaged property is described as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one half of the mill and lode," is not void for uncertainty; it being possible to identify the property by resorting to extrinsic facts. *Hancock v. Watson*, 546

DESCRIPTION. *Continued.*

2. *Rule of construction.*—A grammatical construction is not always to be followed, but that construction is always to be adopted which will accomplish the object for which the instrument was executed. *Id.*

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DUMP—See MEASURE OF DAMAGES, 20.

EJECTMENT.

1. *Title by parol will support action for possession.*—Proof by plaintiffs of their better right to the possession of a mining claim is sufficient to sustain an action to recover possession and damages for working the same. It is not necessary to prove a transfer of title by written conveyance; a parol transfer with delivery of possession is sufficient. *Antoine Co. v. Ridge Co.*, 97

2. *Effect of recovery in ejectment as to fixtures.*—By their recovery in ejectment, of the lands, the plaintiffs recovered all the fixtures put there by the defendants or their lessees, and by the writ of *habere facias possessionem* were put in possession thereof. The right of defendants to their equitable defense, viz., that the fixtures were full compensation for the use of the premises, then became determined, and this right could not be impaired by the plaintiffs afterward permitting the former lessees of the defendants to remove a portion of the machinery. *Ege v. Kille*, 213

3. *Possession sufficient to support ejectment on public land.*—The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation—a subjection to the will and control—a *pedis possessio*. The mere assertion of title, casual acts of ownership or improvement, or the bare marking of boundaries, have never been held a valid possession after the lapse of sufficient time to complete the location or appropriation. *Robinson v. Imperial Co.*, 370

4. *Plaintiff in ejectment may recover less than declared for.*—The plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for. *Halsey v. Martin*, 549

EMINENT DOMAIN.

1. *Assessments for taxes are not competent evidence* to aid a jury in determining the value of land. *Hanover Co. v. Ashland Co.*, 205
See EXPERT, 1.

EQUITY—See MISTAKE; MORTGAGE, 1, 7, 33; RECORD, 1, 2; VENDOR AND PURCHASER, 1, 2.

ERROR.

1. *No reversal for error where judgment clearly right.*—A verdict which is undoubtedly right upon the evidence, that is, so clearly right that if it were the other way it would be considered contrary to the evidence, should not be set aside because of the admission of improper evidence or the giving of incorrect instructions. *Robinson v. Imperial Co.*, 371

ESTOPPEL.

1. *Statements as to boundary*.—A statement by one of the plaintiffs to the defendants that they need not be uneasy, that they were not near the line, etc., coupled with other statements which indicated that the statement first made was a mere expression of opinion, does not show a license to work the plaintiffs' ground, nor estop them from claiming the damages which they sustained by reason of the trespass. *Maye v. Yappen*. 101

2. *Estoppel as to title by admissions and declarations*.—A party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle, with respect to the title of property, it must appear: 1, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; 2, that he made the admission with the express intention to deceive, or with such culpable negligence as to amount to constructive fraud; 3, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and 4, that he relied upon such admission, and will be injured by allowing its truth to be disproved. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another. Tested by these rules the matters set up can have no operation by way of estoppel. *Boggs v. Merced Co.*, 334

3. *Government not estopped by representations of claimant*.—Though a party represent to another that certain grounds are public land, and thus induce the latter to enter and occupy the same, the former will not thereby be estopped to acquire a title from the government, for the government can not be estopped by such representations from asserting its title and disposing of the land to whomsoever it thinks proper. *Id.*

See MISTAKE, 8; MORTGAGE, 22; NEGLIGENCE, 20.

EVIDENCE.

1. *Question calling for a conclusion of law*.—It is not error to disallow a question, the answer to which is a deduction rather than a fact; for instance: Was it not your business to be on the lookout for dangerous places? when the contention was whether the witness or some other party was liable for the consequence of a failure to keep such lookout. *Lake Superior Co. v. Erickson*, 39

2. *Transfer book not proved by inspection*.—That a certain book is the transfer book of a corporation can not be proved by inspection. Corporation books do not prove themselves. *Pittsburg Co. v. Foster*, 116

3. *General objections to evidence*.—Where there is a general objection to evidence and part is admissible, it is not error to overrule the objection, although part of the offer be inadmissible. In such case there must be a special objection to the inadmissible part. *Laubach v. Laubach*, 177

4. *Diary memoranda*.—An entry in a diary kept by an agent is not admissible to prove a fact therein stated unless it is shown that it was the duty of the agent to make the whole entry. *Trotter v. Maclean*, 264

EVIDENCE. *Continued.*

5. *Proof of mailing letter.*—A witness produced a copy of a letter which, he said, was made by him, and swore that he should, in the ordinary course of business, have posted the original. *Held*, that this was evidence of posting, and that the original not having been produced, the copy was good secondary evidence. *Id.*

6. *Analysis of the reasons why courts refuse to reverse on the weight of evidence alone.*—In determining the weight to be given to testimony, the number of witnesses being greater upon the one side or the other, while that is a consideration always to be looked to, it is of itself by no means a controlling one. There are many other equally important tests of truth, chief of which is that of a cross-examination in the presence of the court and jury. The witness' manner, demeanor and bearing upon the stand, his replies, whether frank and open, or reluctant and evasive, his manner of expressing himself, whether moderate, dignified and respectful, on the one hand, or extravagant, impertinent and reckless, on the other, the intelligence of the witness, and the means of information in respect to the matters of which he speaks, his relation to the parties to the suit, his interest in the result—all these are of vital importance in determining the credit to be given to the witness. But these can not all be presented in a record or transmitted to another court to enable it to review the testimony by the same lights; hence the rule that this court will not reverse upon the evidence merely because it may appear to us that the preponderance may be against the verdict. *Illinois Co. v. Ogle*, 282

See EXPERT; PARTITION, 1; PLEADING AND PRACTICE, 1; STATUTE OF LIMITATIONS, 1; VERDICT, 1; WITNESS.

EXECUTION—See MORTGAGE, 10.

EXECUTORS.

1. *Right of action passes to executor.*—Three tenants in common brought their action in trespass for mining and taking away coal, etc., on their lands. One of the plaintiffs died, having devised an estate for life to his wife in the lands in controversy. His executors were substituted in his place as parties: *Held*, that the joinder was right; that the action survived to the executors and not to the heir, and that the executors had a right to recover the entire damages, even if they amounted (being from destructive trespasses) to the full value of the fee in the lands. *Barton Co. v. Cox*, 158

EXPERT.

1. *Competency of witness as to value of land.*—Witness stated generally that he owned land in the neighborhood, and was acquainted with its market value; that he knew the general value of ore land in the neighborhood; knew the tract in question, and it had on it an ore bank, but his knowledge of sales was derived from hearsay, and he had no practical knowledge of ore land never mined. *Held*, that his opinion was competent evidence to aid in determining the value of the land. *Hanover Co. v. Ashland Co.*, 204

EXPERT. *Continued.*

2. *Discretion of court.*—The competency of a person to give his opinion as an expert, if on a preliminary examination he appears to have any pretensions to speak as such, rests much in the discretion of the judge trying the cause. *Ardeaco Co. v. Gilson*, 669

3. *Idem.*—It is not imperatively required that the business or profession of the witness should be that which would enable him to form an opinion. *Id.*

FIXTURES.

1. *Machinery of ore-bank, part of realty.*—Whether fast or loose, all the machinery of an ore-bank which is necessary to constitute it such, and without which it would not be an ore-bank equipped and ready for use, is a part of the freehold, and passes with the realty. *Ege v. Kille*, 213
See EJECTMENT, 2.

FOSSILS—See MINERALS, 1.

FRAUD.

1. *Conveyance to defraud creditors—Equity.*—A conveyance given for the purpose of putting property beyond the reach of creditors is fraudulent, and a court of equity will leave the parties where it finds them. It will refuse the fraudulent grantor any relief founded upon the idea that the grantee holds the property thus fraudulently conveyed in trust for his benefit; and no such trust will be recognized in equity for the purpose of working out a mistake to serve as the foundation for reforming a subsequent conveyance from the grantor to parties taking through the fraudulent grantee, without notice of the fraud, and holding the property fraudulently conveyed. *Kinney v. Consolidated Va. Co.*, 459

See MEASURE OF DAMAGES, 26; MORTGAGE, 14; PATENT, 1; STOCK, 1.

INJUNCTION.

1. *Injunction, controlling meaning of contract at trial.*—The injunction in this case modified so as to permit the defendant to proceed with his suit at law, but restraining him from setting up at the trial any other meaning of the contract than that indicated by the court. *Firmstone v. De Camp*, 439

See MINERAL SPRINGS, 1.

JUDGMENT—See APPEAL, 1; MORTGAGE, 16.

JURY—See PLEADING AND PRACTICE, 2, 8.

LACHES.

1. *Rescission—Waiver.*—Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract. *Grymes v. Sanders*, 445

2. *Statu quo—Successful adventure—Refusal to accept risk.*—The grantor in a deed who has sold on account of his unwillingness to pay assessments or take the risk of developing the mining ground conveyed,

LACHES. *Continued.*

which mining ground, upon the expenditure of the grantee, is afterward developed into a mine of enormous value by the discovery of a bonanza, can not be heard afterward to allege in equity as late as two years after his transfer, a mistake in the deed as to the number of feet granted. And although his grantees have made immense sums out of the proceeds of the mine, it is not a case where the parties can be placed *in statu quo*, within the proper meaning of the term—a property of then unknown or little value having become, since the grant, by reason of the mining expenditures of the grantee, a mine of known and very great value. *Kinney v. Consolidated Va. Co.*, 458

LAND.

1. *Land* includes not only the ground or soil, but everything attached to it, above or below. *Stratton v. Lyons*, 314
See FIXTURES, 1.

LEASE.

1. *Acceptance of rent creates tenancy.*—The receipt of rents by the mortgagee upon entry will create the relation of landlord and tenant, but only a tenancy from year to year. Such receipt of rents will not make valid the lease for the unexpired term, as against the mortgagee. *Gartside v. Outley*, 566

2. *Parol evidence to qualify working covenant.*—In *covenant* upon a lease under seal, it was inadmissible to prove that when the lease was preparing, the quantity of coal to be mined under the lease was omitted at the request of the defendant, and that "he then undertook and promised to mine as much as he could dispose of." *Lyon v. Miller*, 85

3. *Accepting lease equivalent to execution.*—By accepting the lease P. became bound to sink the well, though he had not signed the lease, and his omission to execute it under seal was of no importance. *Chamberlain v. Parker*, 145

4. *Lease perpetual by implication.*—Oil lease in which lessee covenants to sink a well, in which lease no term was limited, *construed* as a perpetual grant of the well to lessee, if he completed it and kept the covenants of the demise. *Id.*

5. *Contract construed as a lease.*—A grant of lands to mine for coal "so long as there is coal to mine thereon" with leave to take, under certain conditions, all the coal in the lands, and also containing mutual covenants, and a provision of forfeiture in case of non-compliance, construed to be a lease. *Gartside v. Outley*, 566

6. *Lease distinguished from license.*—An instrument using the terms "hath demised, leased and let * * * the right to mine and take away coal from the Salem vein" is a lease and not a license. A right to use a mine necessarily implies a right to possess it. The instrument is not impaired as a lease by the use of the words "right to mine," etc.; a grant of use and possession is the consideration for something to be rendered and constitutes a lease of the thing to be possessed. *Offerman v. Starr*, 614

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1. *Parol license must be pleaded.*—In order to justify entry upon land for the construction of a ditch under a parol license, the license must be pleaded. *Alford v. Barnum*, 422
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LIEN—See MERGER, 4; MORTGAGE, 29, 30.

LOCATION.

1. *Completion of location prevented by force.*—A party attempting to locate a claim, and being engaged in fencing it, was driven off by force: *Held*, that having complied with the law as far as he could, he had acquired a good possessory title against all persons, and although the fence he had commenced was not of the proper character, it would be presumed that an inclosure in all respects sufficient would have been completed. *Robinson v. Imperial Co.*, 370
2. *A wrongdoer is not permitted to profit by his own wrong.* *Id.*
See MILL SITE, 1, 2.

LODE.

1. *Quartz—Excludes placers.*—The word quartz, used in a deed of a mining claim, treated incidentally as descriptive of a lode claim, as distinguished from a placer or "surface mining" claim. *Kinney v. Consolidated Va. Co.*, 459

MASTER AND SERVANT.

1. *Superintendent with full powers of hiring—Complaint insufficient.*—In an action against the owners of a mine for injuries sustained by an employe, occasioned by the negligence of the engineer, the complaint stated that the mining superintendent had full power and authority to employ and discharge servants and laborers at discretion and that the superintendent knew that the engineer was incompetent and negligent before the injury complained of: *Held*, that a demurrer to the complaint was properly sustained, because the complaint contained no averment that defendants were negligent in employing the superintendent. *Collier v. Steinhart*, 1
2. *A servant takes upon himself the ordinary risks* and perils of the service in which he voluntarily engages. *Kielley v. Belcher Co.*, 3
3. *Ordinary risks defined.*—These ordinary risks include all such as, arising out of the nature of the work, happen, notwithstanding the exercise of due care, and also those arising from the negligence of those of his fellow servants who are engaged in the same department of the master's general business, and who are not his superiors in authority. *Id.*
4. *Fellow servants in distinct departments.*—The rule which exempts the master from liability for injuries caused by one fellow servant to another does not extend to the case of servants serving in distinct departments of the master's general business. *Id.*
5. *Negligence of fellow servant.*—If an employe in a mine is injured by the negligence of his co-laborer in the same line of employment, there is no liability for the injury on the part of the employer. *Kielley v. Belcher Co.*, 11
6. *Who are fellow servants in a mine.*—Parties who are engaged in the common employment of removing ore from a mine, whether occupied

MASTER AND SERVANT. *Continued.*

in blasting, picking, loading or wheeling out the ore, are fellow servants within the rule exempting their employer from liability for injuries resulting from the negligence of servants employed in the same line of employment. *Id.*

7. *Known risks assumed by employees.*—If an employe engaged in working a mine where the means provided for warning the workmen of an impending blast are insufficient, continues in such employment with full knowledge of the danger and of the imperfect means of guarding against it, he assumes the risk, and can not recover from his employer for injuries resulting from the blast. *Id.*

8. *Foreman, superior servant.*—A foreman in charge of hands is not a fellow, but a superior servant. *Berea Stone Co. v. Kraft*, 16

9. *When the foreman is for the moment discharging the duties of a laborer*, his master is answerable for negligence arising from his acts to the same extent as if the act causing the injury had been done by an inferior servant under his directions. *Id.*

10. *Negligence of fellow servant—Liability of employer.*—By the Civil Code of California an employer is not bound to indemnify his employe for losses in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe. *McLean v. Blue Point Gravel Co.*, 22

11. *Injury of inferior by superior.*—The code referred to recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged. *Id.*

12. *Miner held to regulations after discharge while still in the pit.*—By the Coal Mines Regulation Act, 1872, § 52, power is given to frame special rules for the conduct of persons employed in or about a coal mine. By a special rule in force at the Hewlett pit no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In this mine the workmen had power to discharge themselves at a moment's notice. The respondents, workmen there, being dissatisfied, discharged themselves and asked the hooker-on to allow them to ascend the pit, but he refused to give such permission until the ordinary time came for workmen to quit the mine. The respondents, however, ascended contrary to his direction. *Held*, that the respondents were guilty of a breach of the special rule above mentioned and liable to the penalty imposed for breach thereof. *Higham v. Wright*, 24

13. *Who are fellow servants.*—In order that workmen should be fellow servants within the meaning of the rule that a master is not responsible to a servant for an injury caused by his fellow servant, it is not necessary that the workman causing and the workman sustaining the injury should both be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the

MASTER AND SERVANT. *Continued.*

same common work, and performing services for the same general purposes. *Lehigh Valley Co. v. Jones*, 30

14. *Idem—Overseer and workman.*—The rule is the same, although the one injured may be an inferior in grade and subject to the control and direction of the superior whose act caused the injury, provided they were both co-operating to effect the same common object. *Id.*

15. A "mining boss" and a "driver boss" are fellow servants, and where the death of the latter is caused by the negligence of the former, the owner of the mine is not responsible. *Id.*

16. *Liability of company for negligence of contractor—Facts of the case.*—Where a company had its ore dug by short contracts, under circumstances which showed that the company reserved control of the mine, and specially the timbering, the company is responsible for injuries to a workman employed by the contractor resulting from the fall of a scale in the winze being sunk by the contractor, such fall being the result of negligence. *Lake Superior Co. v. Erickson*, 40

17. *Idem—Legal privity* may sometimes exist between one contracting party and the servants of the other; as where the servants are exposed to risk from being obliged to work upon the former's premises under an arrangement which binds him to keep the premises in safe condition. *Id.*

18. *Injury to contractor's employe.*—Where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employes for injury in consequence of neglect of that duty. *Id.*

19. *Mining bosses and miners fellow servants—Negligence.*—Under the provisions of the Mine Ventilation Act of March 3, 1870, "mining bosses" and "miners" are fellow servants, and where the death of the latter is caused by the negligence of the former, the owner of the mine is not responsible therefor. *Delaware Co. v. Carroll*, 47

20. *Idem—Mining bosses appointed under statute.*—The fact that said "mining bosses" are appointed under an act of assembly, which prescribes their duties, does not change this relation of "fellow servant" where it is shown the requirements of the act in regard to their selection have been complied with, and it does not appear they were incompetent, or that there was negligence on the part of the mine owner in their employment. *Id.*

21. *Miner—Risk of falling scales.*—A miner who knows, or by the exercise of ordinary care might have known, of the unsafe condition of a coal roof, and continues to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, assumes the risk and can not recover in case of injury from falling scale. *Money v. Lower Vein Coal Co.*, 56

22. *Duty of master to inform servant of danger incident to occupation.*—The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of the facts. *McGowan v. La Plata Co.*, 59

MASTER AND SERVANT. *Continued.*

23. *The master is answerable* for the conversion of a customer's property intrusted to his servant in the course of his business or trade. *Armory v. Delamirie*, 66

24. *Right of selection necessary to fix liability.*—The right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows. *Boswell v. Laird*, 617

25. *Employer liable after acceptance of work.*—After the acceptance of the work or construction, by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency, and the liability of the contractor ceases. *Id.*

26. *Knowledge of habitual violation of rules.*—Defendant, proprietor and manager of a colliery, published under statute 18 and 19 Vict. c. 108, special rules, one of which provided for the testing each day, in a particular manner, the rope by which the pitmen descended. This rule was, to defendant's knowledge, habitually violated by the banksman and others, whose duty it was to carry it out. S., a pitman in defendant's employ, who knew of the rule and of its habitual violation, refused, though advised by the banksman, to examine the rope (which had been accidentally injured the night before, and not tested since) before descending by it into the pit. The rope broke and S. was killed. *Held*, that the defendant was not liable. *Senior v. Ward*, 646

27. *Negligence of fellow servant.*—A master is not responsible for an injury to a servant by the negligence of a fellow servant, unless he has failed in ordinary care in the employment of the culpable party. *Ardesco Co. v. Gilson*, 669

28. *Usual risks assumed by employe.*—One who agrees to work for another in any employment takes upon himself the usual risks of such employment. *Strahlendorf v. Rosenthal*, 676

29. *Idem—Dangers known only to employer.*—If there exist facts known to the employer and unknown to the employe, increasing the risks of the miner beyond the ordinary hazards, the employer is bound to disclose such facts to his employe; otherwise he will be liable as for negligence in case of injury to the latter, resulting from such unusual risks. *Id.*

See AGENT; NEGLIGENCE.

MEASURE OF DAMAGES.

1. *Damages—Amount of.*—The verdict will not be set aside for "excessive damages" when it is not apparent that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence. *McGowan v. La Plata*, 60

2. *Evidence controlled by but one party and he producing it not.*—Where the evidence of the true measure of damage lies solely in the power of one party to produce and he refuses to produce it, the strongest measure of damage is to be presumed against him. *Armory v. Delamirie*, 66

3. *Lessee recovering full value against trespasser.*—James Theobald demised land to the plaintiff at an annual rent for 21 years, with

MEASURE OF DAMAGES. *Continued.*

liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre *being after the same rate that the whole brick earth was sold for*. A stranger dug and took away brick earth; the lessee recovered against him the full value of it. It was *held*, that he was entitled to retain the whole damages. *Attersoll v. Stevens*, 67

4. *Working across boundary*.—Where the defendant in working his coal mine broke through the barrier and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale: *Held*, in trespass for such working, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it. *Martin v. Porter*, 74

5. *Damages where trespass is done under claim of right*.—Where there is fraud or negligence on the part of the defendant, the jury may give the value of the coals at the time they first became chattels; but where taken without fraud or negligence in the belief that he had a right to take them, they should give only the value of the coal in place. *Wood v. Morewood*, 77

6. *Value of the coal when first severed*.—In trespass for digging plaintiff's coals in his mine, and taking and converting them, the proper measure of damages is the value of the coal when it was first severed from the mine; if defendant has afterward removed the coal and brought it to the pit's mouth, plaintiff can not recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed. *Morgan v. Powell*, 79

7. *Defendant allowed cost of hoisting*.—The defendant, in trespass, must be allowed in damages for his expense and labor in removing the coal and bringing it to the pit's mouth, but not in first severing it from the mine. *Id.*

8. *Trespass for digging lead ore on U. S. land*.—In trespass for digging and carrying away lead ore from lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug. The injury done the soil is the gist of the action; and ore extracted must be considered an aggravation of the damages. *United States v. Magoon*, 84

9. *The rental value of the land* is not a proper measure of damages in the case of trespass for taking ore. *Id.*

10. *Lessee mining beyond bounds*.—Under a lease authorizing the defendant to mine coal on land *south* of a designated line, the lessors in covenant on the lease were not entitled to recover for coal mined *north* of the said line; and that the plaintiffs were in possession of the land north of the said line was not material. For coal mined *north* of the line the defendant may be liable in trespass. *Lyon v. Miller*, 85

11. *Royalty recovered on coal not dug*.—The plaintiffs leased to the defendant the right to mine coal on their land *south* of a disputed line, at a royalty of so much per bushel. The plaintiffs were permitted to recover not only for the coal actually mined, but for what the defendant

MEASURE OF DAMAGES. *Continued.*

reasonably could and should have mined upon the land leased; but for the quantity not mined, the measure of damages was the difference between the stipulated rate of compensation and the value of the coal left unmined. *Id.*

12. *Lessee surrendering lease to third parties to sink for coal, who fail to dig for same.*—Defendants covenanted with the plaintiff, that if he would surrender to his lessor a certain lease, they would, within two years, or within such period as should be fixed by a new lease which the lessor had agreed to grant them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, and in case a workable vein should be reached, to pay to plaintiff £2,500. The plaintiff having sued defendants for a breach of this covenant, gave evidence to show that if the defendants had sunk the pit they would have found the coal. *Held*, that plaintiff was entitled to more than nominal damages, and that the true measure of damages was the amount which he had lost by being deprived of the opportunity of finding marketable coal. *Pell v. Shearmdn.* 89

13. *Digging ditch across another's land.*—In an action against defendant for digging a ditch across plaintiff's land praying damages, and also to have the ditch declared a nuisance, and abated: *Held*, that the plaintiff could not recover beyond the injury sustained; that as the cost of filling up the ditch might exceed the injury resulting from leaving it open, such cost of filling was not a proper measure of damages. *De Costa v. Massachusetts Co.,* 13

14. *Prospective damages* can not be obtained unless it appear that the party will be subjected to the specific loss for which he demands compensation. *Id.*

15. *Defendant trespassers refusing to disclose the amount taken.*—If, in an action for damages for taking gold from a mining claim, the plaintiffs have not, and the defendants have, the means in their power of showing the correct amount of gold taken out, the latter are themselves to blame if the jury return too large a verdict of damages. *Antoine Co. v. Ridge Co.,* 97

16. *Ignorance of boundary no defense in trespass.*—If the owner of a mining claim, in ignorance of the location of the boundary line between his claim and the one adjoining, work across such line and take away gold-bearing earth from the adjoining claim, such ignorance is no excuse for the trespass, and it is error to admit evidence of it in mitigation of damages. *Maye v. Yappen,* 101

17. *The question whether the trespass was willful or was ignorantly done* is immaterial when plaintiff is entitled to recover only the damages actually sustained. *Id.*

18. *Value of the gold extracted, less cost of washing.*—If a party in ignorance of his boundary lines enter upon an adjoining mining claim, and take away gold-bearing earth therefrom, the measure of damages in an action for the trespass upon the land is the value of the gold-bearing earth at the time it is separated from the surrounding soil and becomes a chattel. The expense of extracting or separating the gold from the earth after it is first moved from its original location, should be deducted from the value of the gold taken out. *Id.*

MEASURE OF DAMAGES. *Continued.*

19. *Rule of damages dependent on form of action.*—The rule of damages depends, to some extent, upon the form of action, and in *trover* it has been held that the party whose property has been taken is entitled to the enhanced value until it has been so changed as to alter the title. *Id.*

20. *Dump deposits—Damages limited to value of land.*—Where the plaintiff claimed damages for the deposit of a dump pile from a quartz lode upon his building lot, and it was shown that the cost of removing the dump would be greater than the value of the premises, the measure of damages is limited by the value of the lot, although, in ordinary cases, the measure of damages would be the cost of removal. *Harvey v. Sides Co.*, 107

21. *Measure of damages—Coal taken inadvertently.*—In assessing compensation for coal already gotten by the defendant, where the court was of opinion that he had worked it inadvertently and not fraudulently: *Held*, that he was to pay only the fair value of such coal as if he had purchased the mine from the plaintiff. *Hilton v. Woods*, 110

22. *Failure to deliver engine for transporting coal.*—Foster & Co. contracted to furnish defendant, on the first of February, an engine to draw coal cars on a track of unusual width. The engine was not delivered until May. Foster & Co. having sued for the price, defendant showed in proof that an engine for such track could not be hired, and that he had to transport his coal by horses: *Held*, that evidence of the difference of cost of transportation between horse power and by the engine during the period of delay was admissible on the question of damages. *Pittsburg Co. v. Foster*, 116

23. *General test.*—Damages ordinarily recoverable are those necessarily following the breach which the defaulting party might be presumed to know would result from his failure. *Id.*

24. *Damages too remote.*—Evidence that the defendants could have moved and hauled more coal with the engine than with horses, to show the profits from the increase, was inadmissible, being too remote. *Id.*

25. *Proximate cause of damage.*—The rule of damages in cases of fraud or breach of contract is that they must be the natural or proximate consequence of the act complained of, and those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract. *Crater v. Binninger*, 124

26. *Fraudulent sale of interest in oil speculation—Deducting value of interest retained by plaintiff.*—The defendant, by false representations, induced the plaintiff to enter into an oil speculation and to take a one eighth interest at a price much above the original cost of the land. The speculation was a failure: *Held*, that ordinarily the measure of damages would be the entire loss sustained by the plaintiff in the transaction into which he was inveigled, less the value of the interest which the plaintiff still held in the land. *Id.*

27. *Moneys advanced for purchase.*—When a defendant is fraudulently led into a losing speculation, moneys put into the scheme and lost in the ordinary course of the adventure may be considered as proximate and recoverable damages. *Id.*

MEASURE OF DAMAGES. *Continued.*

28. *Where the vendor avers his land cost a certain price* and that the vendee may come into the venture at cost price, whereas in fact the original cost was less than represented, the vendee is entitled to damages to the extent of the difference. *Id.*

29. *Leaving the law to the jury.*—An instruction to the jury that they may “assess such damages as the evidence would warrant,” without giving them any rule or standard, is not a mere omission, but a misdirection. *Gilmore v. Hunt*, 134

30. *Vendee kept out of possession; mesne profits, the measure.*—Gilmore agreed to convey coal land to Hunt, part of the consideration to be paid in notes. In suit on the notes Hunt gave evidence by way of set-off, that Gilmore refused to give possession, and he had to obtain it by ejectment: *Held*, that the measure of damages on the set-off was the amount of rent or profit which Hunt would have derived from the land while wrongfully kept out of the same, i. e. the mesne profits. *Id.*

31. *Disregard of instructions as to measure of damages.*—The court should hold the jury to the strict rule as to the measure of damages with a firm hand, by setting aside the verdict whenever they disregard it. *Id.*

32. *Delivery of iron inferior to contract.*—Iron having been delivered under a contract, the vendor was notified that it was inferior and requested to take it away, which he neglected to do. The vendee had then the right to dispose of it or use it, and the vendor was entitled only to its actual market value. *Youghiogeny Co. v. Smith*, 139

33. *Idem—Measure of damages.*—The measure of damages to the vendee to whom an inferior article has been delivered, when he retains the article, is the difference between the value of the article and what a good article could be obtained for. *Id.*

34. *Breach of contract of lessee to sink oil well.*—C. leased to P. certain oil lands, reserving no rent and stating no term of demise. In the lease P. agreed to put down a well to the depth of six hundred feet, by a date named. Upon failure to perform, a right of re-entry was reserved to lessor. P. did not sink the well. Upon action to recover for the breach: *Held*, that under the lease, the well, if dug, would have been P.'s, and the product his; and that C. could only recover nominal damages for the breach, and not what it would cost to sink such a well. *Chamberlain v. Parker*, 144

35. *Breach of useless contract.*—There may be a loss, in a legal sense, sustained by a party for a breach of a contract, though its performance might have injured his property—as if he should contract for a useless structure on his own land. *Id.*

36. *Shares in a ditch company can have no peculiar value*, considered with reference to the ownership of property covered by the ditch, beyond the purchasable value of such shares in the market. *Booker v. Goodwin*, 149

37. *Market value—Failure to deliver stock.*—The measure of damages in cases where there is a conversion of, or failure to deliver, a certain number of shares of stock having no peculiar value, is their market

MEASURE OF DAMAGES. *Continued.*

value, either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances. *Id.*

38. *In absence of fraud, expenses allowed.*—When coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud) will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing it and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *United Merthyr Co., In re,* 153

39. *Injury to coal left standing.*—In trespass for breaking and entering plaintiff's coal lands he is entitled to recover its worth per ton in its native bed for all such coal as defendants, by their acts, have rendered impossible of removal; and for coal which may be still won, but at greater expense on account of defendants' acts, he is entitled to recover what the evidence may show to be the depreciation in value of such coal. *Barton Co. v. Cox,* 157

40. *No deduction of expenses.*—In trespass for coal mined and taken the proper estimate of damages is its value, after it is severed and before removal, without deducting the expense of severance. If defendants knew that the land was not their own, exemplary damages are allowed. *Id.*

41. *Review of authorities.*—The English and American precedents reviewed, and *Martin v. Porter* (10 M. R. 74) followed. *Id.*

42. *Breach of contract—General rule.*—When a vendor fails to comply with his contract, the general rule for the measure of damages is the difference between the contract and market price at the time of the breach. *McHose v. Fulmer,* 173

43. *When the article can not be obtained in the market,* the measure is the actual loss the vendee sustains. *Id.*

44. *Where vendee has in the meantime resold the article.*—McHose, a manufacturer, contracted for iron from Fulmer, who failed to comply, and McHose could not supply himself in the market. *Held,* that the measure of damage was the loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price upon contracts he was to fill, relying on Fulmer's contract. *Id.*

45. *Contract to rescind stock sale.*—J. sold stock in a silver mining company to T., and agreed that when T. should desire it he would take it back and repay the price: *Held,* that upon tender of the stock and refusal to refund the price, the measure of damages was the price, with interest from date of tender. *Lubrich v. Lubrich,* 177

46. *On refusal by a vendee to accept goods sold* him the measure of damages is the difference between the contract and the market price at the time of refusal. *Id.*

47. *Where the contract is that the vendee may rescind the contract,* the vendor to pay back the price, or the contract is rescinded by the vendee by reason of inherent vice, the measure of damages is the price paid and interest. *Id.*

48. *Complicated oil contract—Parol proof excluded—Sale by sam-*

MEASURE OF DAMAGES. *Continued.*

ple.—Defendants sold to plaintiffs 100 barrels (4,000 gallons) of oil, and agreed in writing to deliver the oil when called for, the quality of the oil to be like the sample delivered. It was understood by both parties that the oil was a part of a lot of 150 barrels, averaging forty gallons each, but the plaintiffs were not informed that there were three different grades in the lot. Upon demand by plaintiffs, several months later, the defendants delivered 100 barrels containing but 1,821 gallons, of quality inferior to sample. The diminution was due to leakage. In an action to recover for the breach of contract, *held*: 1. That conversations relative to the agreement, held prior to the written contract, should have been excluded from the jury. 2. That the writing was the only proper evidence of the contract. 3. That it proved an executory, not an executed, contract, and, 4, that defendants were bound to deliver the whole quantity of oil specified when called for. *Foot v. Marsh*, 185

49. *Trespass for taking coal.*—In an action of trespass for the taking of coal from the mine of another, the measure of damages is the value of the coal in the bank after it is dug, or the value of the coal at the mouth of the pit less the cost of conveying it, after dug, from the mine to the mouth of the pit. *Robertson v. Jones*, 190

50. *The plaintiff is not limited* in his recovery to the value of the coal taken as it lay in the bed. *Id.*

51. *Trover, after demand, for coal severed by trespasser.*—If one wrongfully take coal from the bank of another, the latter may, at any time after the taking, demand it, and upon refusal to deliver, might, it seems, in an action of trover, recover the value of the coal in its condition at the time of such demand. *Id.*

52. *Tro er—Coal in the run—What expense deducted.*—Defendant, in 1872, sank a shaft on its own land to the depth of 549 feet, and worked its coal bed to and beyond its boundary. Upon defendant's filing certain maps required by statutes in aid of ventilation in 1873, plaintiff learned for the first time that defendant had worked across bounds, and extracted 610 tons. Plaintiff then demanded this coal which had long since been disposed of. In trover for the coal so taken it was *held*: 1. That the measure of damages was the value of the coal at the mouth of the shaft, less the cost of carriage from the breast where broken, which is only another mode of expressing its value as it lay in the run where it was not salable. 2. That the conversion was complete at the moment of severance. 3. For the expense and trouble of sorting, defendant could not claim to be reimbursed, but for the cost of bringing it to the pit's mouth they should be allowed, because any person purchasing the coal in the pit would have deducted from the price such cost of carriage. *McLean Co. v. Long*, 193

53. *The measure of damages is the same in trespass and trover*, except where circumstances of aggravation are relied on in trespass. *Id.*

54. *Mining coal from land of another.*—In trespass for taking coal from the plaintiff's mine, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging. *Illinois & St. L. R. R. Co. v. Ogle*, 198

MEASURE OF DAMAGES. *Continued.*

55. *Approximation of values.*—In trover for the conversion of steel ingots, there was no direct proof of their market value at the time of the conversion, but it was proved that steel made from such ingots was worth a certain sum per pound, and how much it would cost to convert the ingots into merchantable steel. *Held*, that the proof furnished sufficient data to enable the jury to approximate the value of the ingots, by taking the cost of converting them into steel from the market value of merchantable steel. *Meeker v. Chicago Steel Co.*, 202

56. *Diversion of stream used to wash ore.*—The measure of damages for the diversion of a stream whereby a farm with an ore bank thereon is injured, is the difference in the market value of the property as a farm and ore bank immediately before the diversion of the stream, and immediately afterward as affected thereby, without reference to the fact that the water of the stream was formerly used, or might hereafter be required for use in washing the ore obtained from the ore bank. *Hanover Co. v. Ashland Co.*, 204

57. *Bona fide claimant liable only for value of ore in place.*—In trespass for mesne profits, arising from ore lands, it appeared that the defendants were *bona fide* purchasers for value, and in possession under color of title. At the time they took possession, the mines were unimproved, and defendants expended large sums of money in their development, and made permanent improvements of great value thereon. *Held*, that having acted in good faith in the working of the mines and removal of the ore, they were chargeable only with the value of the ore in place. *Ege v. Kille*, 212

58. *The value of the ore in place is to be ascertained* by deducting the cost of mining, cleansing and delivering the ore in market, from its market value, thus delivered. *Id.*

59. *Improvements as compensation for use of premises.*—The action for mesne profits is an equitable one, and hence a *bona fide* occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises. *Id.*

60. *The value of the ore in place is the only just rule.* where it is taken under *bona fide* claim of right, or where one tenant in common, in removing his own, necessarily takes his co-tenant's share. *Clowser v. Joplin Co.*, 222

61. *Damages for coal rendered inaccessible.*—In an action for damages to the reversion caused by removing coal in such manner as to injure the pillars and to render it more difficult or impossible to mine the remaining coal, the plaintiffs are entitled to recover for such coal as can not be won, what it is worth per ton in its native bed, and for so much of such coal as can be removed but with increased expense, damages to the extent of such expense; also for the depreciation of the value of the lands. *Franklin Co. v. McMillan*, 224

62. *Cost of digging—Exemplary damages for trespass.*—In an action of damages for mining and carrying away coal, the measure of damages is the value of the coal when first severed from the bed, allowing

MEASURE OF DAMAGES. *Continued.*

nothing for the expense of digging, and if the trespass was not unintentional, exemplary damages may be added. (ROBINSON, J., dissenting as to non-allowance of expenses.) *Id.*

63. *Failure to deliver stock*.—Where there is no trust relation between the parties and no obligation to deliver specific stock, the measure of damages for a failure to deliver stock is the market value of the stock on the day it should have been delivered, with interest thereon to the time of trial. *Huntingdon Co. v. English*, 233

64. *Form of action immaterial—Complaint construed*.—It does not matter whether the complaint state facts which would amount to trover or to trespass, at common law. Complaint construed and held: valid to support judgment for value of the ore in place, or value immediately after separation. *Waters v. Stevenson*, 240

65. *Recovery by tenant against trespasser—Royalty not deducted*.—The right in the tenant of leased mines is absolute, and if a trespasser take his ore during term, the royalty which the tenant should pay the landlord is not to be deducted. *Id.*

66. *Compensation only, the rule in tort*.—In actions sounding in tort, but not involving fraud (malice) or culpable negligence, the aim of the law is to award full compensation, but nothing beyond. *Id.*

67. *Review of the cases, English and American*, on the question of deductions for cost of mining, in trespass for ore taken. *Id.*

68. *Trespasser allowed cost of mining*.—A trespasser taking ore, in the absence of fraud or culpable negligence by overstepping boundaries, is entitled to deduction of the cost of mining the ore in question. *Id.*

69. *Measure of recovery in inadvertent trespass different from the measure in deliberate trespass*.—A colliery commenced to work adjoining coal owned by trustees in the expectation of a contract under negotiation, giving notice when about to commence the work. Held, that the working, though no contract was afterward entered into, and the trustees had no power to make one, ought to be treated on the same footing as if commenced inadvertently, and upon taking an account the defendant was allowed the cost of severing the coals, as well as the cost of bringing them to bank. But from the time notice was given to defendant that no contract would be made, his working was treated as fraudulent, and he was allowed only the cost of bringing the mineral to bank. *Trotter v. Maclean*, 263

70. *Trover for coal—Expenses not allowed*.—In trover, to recover damages for coals taken by defendant from the land of plaintiff without his consent: Held, that the measure of damages is the value of the coal at the mouth of the shaft less the cost of conveying it, after dug, from the mine to the mouth of the shaft without allowing anything for digging, or separating stone, slate, sulphur and earth from the coal, or for brushing the road. *McLean Coal Co. v. Lennon*, 277

71. *Punitive damages for willful overstepping of boundaries*.—Where one engaged in mining and removing coal from his own land, crosses the line and proceeds to mine and remove coal from the land of another, not by mere mistake, but knowingly and willfully, in an action of trespass

MEASURE OF DAMAGES. *Continued.*

by the owner of the land so intruded upon, the jury will be warranted in giving punitive damages. (SCOTT, J., dissenting.) *Illinois & St. L. R. R. Co. v. Ogle.* 282

72. *Mining coal from land of another.*—The rule re-affirmed that in an action for trespass for mining and taking coal from the plaintiff's land, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging. *Id.*

73. *Coal worked by mistake beyond boundary—Current royalty the measure of damages—Coal inaccessible to its owner.*—A was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When A purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu, there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A's acre and a half, and, in doing so, damaged the surface. A could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but R. and C.; and the element of willful trespass, and the element of special and exceptional need of support to the surface were absent. In a claim by A for (1) the value of the coal; (2) a sum for "wayleave," and the advantage obtained by working through instead of around the feu; and (3) for damages done to the houses on the surface: *Held*, affirming the decision of the court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value, was the royalty paid by R. and C. for the surrounding coal field; therefore, A was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface. *Livingstone v. Rawyards Co.*, 291

74. *Breach of contract to furnish daily supply of coke.*—C. contracted to deliver to the Furnace Company 36,621 tons of Connellsville coke at \$1.20 per ton, in equal daily quantities, on each working day during 1880. After having delivered 3,765 tons C. notified the company that he would deliver no more coke, offering no valid excuse. The company thereupon contracted with H. for 29,587 tons of coke on terms similar to those of the contract broken by C., except that the price per ton was fixed at \$4, that being the then market price, in February. In May, the price of coke fell to \$1.30 per ton. The company brought suit for damages soon after the breach. *Held*, that they could not recover the difference between the contract price with C., and that with H., but that the proper measure of damages was the sum of the difference between the contract price and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract. *Missouri Furnace Co. v. Cochran*, 309

MEASURE OF DAMAGES. *Continued.*

75. *Recovery after severance, by surface owner against trespasser, for clay severed.*—S., in 1855, conveyed a clay bed on his farm to five persons, who shortly afterward conveyed the same to the U. S. Pottery Co., which company occupied the clay bed until 1857 and abandoned it. In 1874 defendant took possession of the clay bed under color of a deed from one H., and worked it. Plaintiffs had no possession of the clay beds other than the general possession of the surface of the close. *Held*, that plaintiff on such possession could maintain trespass; that defendant could not resist a judgment upon the fact of a title outstanding; but that plaintiff could not recover the value of the clay which belonged to another, but only "the amount of injury directly resulting to the plaintiff from the acts complained of." *Stratton v. Lyons*, 314

76. *Mental suffering as element of damage.*—It is improper to allow compensation for mental suffering as a distinct element of damage, in addition to bodily suffering, in a suit for physical injuries. *Joch v. Dankwardt*, 691

MERGER.

1. *Intermediate vested estate.*—Merger never takes place when it would have the effect to destroy intermediate *vested* estates in third persons. *Logan v. Green*, 322

2. *Second lease of term already let.*—When there is an outstanding lease and the reversioner makes a new lease to third persons, to commence immediately, this is a vested estate; and although the lessees could not take possession of their term, inasmuch as the possession belonged to the first lessee, they would have a *concurrent* lease, and be entitled to all the rents issuing out of the term of the first lessee, and on the expiration of that term they could legally enter and possess the land for the residue of their own term. This estate would prevent a merger when the first lessee became entitled to the possession. *Id.*

3. *Idem—Purchase of reversion by termor lets in intermediate lease.*—But if the deed conveying this second interest created only what is sometimes called a future lease, that is, a contract to have a lease to commence after the expiration of the first lease, then it conveyed no present estate in the land, either in interest or possession. It would be only an *interesse termini*, which neither makes a merger nor prevents one, but may be accelerated in the time of its becoming an estate in the land, by possession, by the merger of an antecedent vested term, through the termor's purchase of the next immediate estate in reversion. *Id.*

4. *Merger of lien by assignment of stock.*—Where the holder of a lien upon stock became owner by assignment from the debtor, thus holding both the lien and the title to the security, the lien merged in the higher right, and as to third parties he must be regarded as absolute owner. *Strout v. Natoma Co.*, 330

MEXICAN GRANT.

1. *Notice of official survey unnecessary.*—Neither the claimant of land under a Mexican grant, nor the United States surveyor general is under any obligation to give notice to any one of the official survey of the tract, directed by the final decree of confirmation, and it is of no conse-

MEXICAN GRANT. *Continued.*

quence how secretly or how openly the survey is made. *Boggs v. Merced Co.*, 334

2. *Difference between official and private survey—Fraud.*—The right which the Mexican government reserved to control the survey of the "Mariposas" tract passed with all other public rights to the United States and the survey must now be made under the authority of the United States, and such a survey is the only one which has any standing in court. The government is not bound by a private survey made by the claimant and presented with his petition for confirmation, and the fact that such survey differs from the official survey is not ground for charging fraud upon the claimant. *Id.*

3. *Mexican grant confirmed by U. S. patent carries the minerals.*—The title to the Mariposa estate is under a grant of the former Mexican government, and a patent from the United States issued upon its confirmation. Such patent invested the patentee with the ownership of the precious metals which the land may contain. It transferred to him all the interest which the United States possessed in the soil. *Ah He v. Crippen*, 367

MILL SITE.

1. *Insufficient location of water right—Posting notice on a tree* or the river bank, claiming a location of a water right at that point, and of right of way for a ditch of a certain capacity from that point to a bend of the river below, followed within six months by fifteen or twenty days' work on the ditch, but not sufficient to make it of any practical use, and accompanied by a monument of stones at a point below the bend suitable for a mill site, after which nothing was done for the next three months: *Held*, not sufficient to constitute possession nor prevent location by a stranger. *Robinson v. Imperial Co.*, 370

2. *Location of mill site, not incident to ditch location.*—A notice of appropriation of a right of way for a water ditch is not a notice of the appropriation of the land upon the sides of it, nor of a mill site in connection with it. *Id.*

3. *Appropriation of water.*—The location of a mill site is not an appropriation of water for purposes of the mill site. *Id.*

MINES.

1. *Underlying seams constitute a single mine.*—A testator had deeded all the seams of coal under his estate, but only two seams were known or worked during his lifetime. After his death a new seam was discovered, which could only be worked by a new shaft. A lease being granted after testator's death, it was *held* that it was not the case of the opening of a new mine, and that the tenant for life under the will was entitled to the annual profits arising from the new seam. *Spencer v. Scurr*, 388

2. *Expressio unius—Poor rate.*—The express mention of coal mines in the statute, 43 Eliz., is a virtual exclusion of all other mines, and therefore other mines are not ratable to the relief of the poor. *Rex v. Sedgley*, 390

3. *Distinction between mine and quarry.*—Whether an excavation be

MINES. *Continued.*

a mine or a quarry is a question of fact; a stone working, where the stone is won by sinking the shafts perpendicularly to the stratum which lies considerably below the surface, and the stratum is worked by roads and gate heads, and the stone raised to the surface by machinery, or carried underground to a tunnel, in the same way as coal and iron ore are usually got, is a stone mine. *Id.*

4. *The word "mine" defined.*—The term "mine," when applied to coal, is equivalent to a worked vein, and if it be worked, a tenant for life may pursue it to the boundaries of the tract. *Westmoreland Co.'s App.*, 394

5. *Coal vein underlying different tracts—Waste by life tenant.*—Where there are two different tracts, separated by an intervening tract owned by another, with a vein extending beneath them, the opening on one tract does not extend to the other, and the tenant for life mining under the unopened one is guilty of waste. *Id.*

6. *The distinction between a mine and a quarry* is that in a quarry the surface is removed, but in mining the beginning only is on the surface and a roof is left overhead. *Darvill v. Roper*, 406

7. *The word mines* implies underground workings. *Bell v. Wilson*, 415

8. *Parol evidence.*—The terms of a reservation in a conveyance are not to be limited by what was ordinarily gotten by a miner in the particular county at the time of the execution of the deed. *Id.*

MINERALS.

1. *Minerals defined*—"Stratum of stone"—"*Fossils*:"—When by an inclosure act certain waste lands were taken away from the lord, and allotted to commoners, except as saved by a clause which reserved "all mines and minerals," etc., "with full liberty of digging, sinking, searching for and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron, stone and fossils," and providing that in working the land for minerals, the lord should keep the first *stratum* of earth separate without mixing the same with the lower *strata*: *Held*, that the act must be construed with reference to the title in the lord, and that a stratum of stone was within the reserving clause, either as a mineral, or by force of the word "fossils." *Held, further*, that the object of the act was to give to the commoners the surface for cultivation, and leave what was not requisite for that purpose; that therefore, the word "minerals" was to be construed not in its general sense as a substance containing metals, but in its proper sense, as including all matters dug out of quarries or mines. *Rosse v. Wainman*, 398

2. *The word minerals limited to the product of mines, excluding the product of quarries.*—In an agreement for partition and the deeds carrying out that agreement the mines of lead and coal and other mines and minerals were excepted, and it was expressed that the profits of the mines excepted should be taken according to the respective estates of the parties. *Held*, that the word minerals was limited by the context to include the product of mines as distinguished from that of quarries, and that limestone quarried from the surface was not within the exception. *Darvill v. Roper*, 406

MINERALS. *Continued.*

3. *Minerals defined by the mode of getting—Freestone.*—In a conveyance the grantor reserved all "mines or seams of coal and other mines, metals or minerals," with liberty to get the same, etc. *Held*, that the term minerals included freestone but that the grantor had liberty to get the freestone only by under ground mining and not by working in an open quarry. *Bell v. Wilson*, 415

4. *Minerals must exist in available quantity.*—In order that lands granted to the Central Pacific Railroad, by acts of Congress, may be classed as "mineral lands," within the clause of the grants reserving mineral lands, it must be shown that the land contains metals in quantities sufficient to render it available for mining purposes. *Alford v. Barnum*, 422.

MINERAL LANDS.

1. *U. S. railroad reservations—Quicksilver.*—The court assumes, the contrary not being alleged, that lands containing cinnabar or quicksilver, are mineral lands within the meaning of the act of Congress granting lands to the Western Pacific Railroad Co. *McLaughlin v. Powell*, 424

2. *A railroad grant patent* is admissible in evidence without first proving that the land is not mineral. *Id.*

3. *Reservation of mineral in U. S. grant.*—In ejectment against a defendant in possession of a portion of land described in a railroad patent, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant. *Id.*

4. *A patent which excepts* from the transfer "all mineral lands, should any be found to exist in the tract described," does not convey lands which are mineral. *Id.*

MINERAL SPRINGS.

1. *Receiver appointed to bottle the water—Receiver appointed on bill praying injunction.*—Plaintiff sued in ejectment for the recovery of a tract of land containing soda springs, and had a verdict. Pending motion for new trial, he filed his petition averring that the springs were of a monthly value of \$500 when the water was bottled and sold, for which purpose buildings had been erected at such springs by the plaintiff; but that defendants had cut a tunnel near the springs and just outside the plaintiff's buildings, tapping the "vein of water," resulting in its escaping, so that it became wholly wasted and of no use to either; that the defendants were insolvent, etc.; praying for an injunction; there was no prayer for a receiver. Among other things the defendants denied that the spring was embraced in the recovery. The judge refused the injunction and appointed a receiver, with directions to collect the water, bottle and sell it, and retain the proceeds: *Held*, on appeal, a proper case for a receiver, and that a receiver might be appointed without a prayer to such effect. *Whitney v. Buckman*, 428

MISTAKE.

1. *Ores erroneously included in mortgage.*—The New Jersey Frank-linite Company executed a mortgage to the complainant on certain tracts of land, and by the mistake of the scrivener, certain ores, which by the agree-

MISTAKE. Continued.

ment of the parties should have been excepted, were embraced therein. The company conveyed the mortgaged premises, including the ores, to A. G. and others in trust, as a mortgage security for certain coupon bonds to be issued by the company. It did not appear that any bonds had been issued. The complainant filed bill of foreclosure and the trustees, by answer and cross-bill, set up mistake and claimed exemption of the ores: *Held*, that if the mistake could be set up, a cross-bill was not necessary, as the defendants would be protected by a decree upon the original bill, declaring that complainant was not entitled to have the ores sold. *But further*, that although the mortgagee obtained his lien on the ores by the mistake of the scrivener, there was no reason why he should be compelled to relinquish his security until his debt was paid. *Ames v. New Jersey Co.*, 434

2. *Ores included in mortgage by mistake—Equity.*—The New Jersey Franklinite Company executed a mortgage to the complainant which embraced, by mistake, as was alleged by the company, certain ores, and which, by the agreement of the parties, were to have been excepted. The company afterward conveyed the mortgaged premises, including the ores, to certain persons in trust, as a mortgage security for certain bonds to be issued by the company. It did not appear that the bonds had been actually issued. A bill of foreclosure being exhibited, the trustees, by answer and cross-bill, set up the mistake, and claimed exemption of the ores. *Held*, that equity grants relief in cases of mistake in written instruments to prevent manifest injustice and wrong, and that if this end is not accomplished, there is no ground for relief. *Held, further*, that even if it had satisfactorily appeared that the mortgage embraced by mistake, more property than the parties intended it to cover, the mortgagee could not be compelled to relinquish any part of his security. *New Jersey Co. v. Ames*, 436

3. *Equity will correct a clear mistake* in a written agreement so as to conform it to the understanding of the parties at the time of its execution. *Firmstone v. De Camp*, 439

4. *Reforming contract for sale of ore.*—Equity will reform a contract so as to import that the ore forming the subject of sale shall come from the mine intended by the parties at the time of the execution of the contract instead of from the mine therein described by mistake. *Id.*

5. *Relief in equity from mistake.*—A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Grymes v. Sanders*, 445

6. *Mistake arising from negligence.*—Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may fairly be expected from a reasonable person. *Id.*

MISTAKE. *Continued.*

7. *Relief in equity from mistake in lease—Oil well not on the land demised.*—Dwight and Ashton leased a tract of land to Mays, with one well partly bored thereon; Mays agreed to sink this well deeper, and to pay the lessors a royalty of one fourth of the oil obtained from it. It was the understanding of both parties to the lease that this well was situated upon the tract leased; it afterward appeared that it was not within the lines of this lease, whereupon the lessees offered to deliver possession of the premises leased and refused to pay a royalty. In a bill filed by the lessors for an account of profits, the court below ordered an account: *Held*, that it was a case of mutual mistake, against which equity will relieve, and that the bill should have been dismissed. *Mays v. Dwight*, 453

8. *Mistake cured by estoppel.*—Where parties had acted upon a certain decree, which was in fact void, whereby twenty feet on the Comstock lode had been set off as the property of the plaintiff and another, and defendant had purchased such twenty feet from the plaintiff, both parties treating the decree as valid, the plaintiff having received his price, and the defendant having, by its expenditures, greatly increased the value of the property, there is no such mistake as a court of equity will correct. Equity will act upon the same hypothesis on which the parties have acted. *Kinney v. Consolidated Va. Co.*, 457

9. *Mistake cured by counter-mistake.*—If the grantor of a mining claim by mistake conveys more of one part of the claim than he intended, and just as much less than he intended of another part, so that the grantee obtains the exact amount which he purchased and paid for, the equities are equal and the mistake against the grantor will not be corrected unless he reforms the mistake in his favor. *Id.*

10. *Unstamped conveyance should be reformed, not canceled—Purchase pendente lite—Possession—Notice.*—K. conveyed certain interests in a mining claim to W., M. and L. by unstamped and unrecorded conveyances, who afterward, by various conveyances, good in form, conveyed the same to C. Afterward, by valid deeds duly recorded, K. conveyed all his interest in the same claim to C., who went into possession under the several conveyances. K. afterward filed a bill in equity against C. to correct an alleged mistake in the latter conveyance and *pendente lite* conveyed all his interest in said claim to parties, one of whom was his counsel of record in the cause, who were made parties to the suit by supplemental bill, but who had no actual notice of the prior unrecorded and unstamped deeds. *Held*, 1. That a correction of the alleged mistake in the deed to C. would involve a repudiation of the unstamped deeds, which would be in conflict with the rule that he who seeks equity must do equity. 2. That K. had nothing to convey *pendente lite* except the possible equity to have his conveyance to C. reformed on the ground of mistake. 3. That if K.'s grantees *pendente lite* took any equities as against his grantees under the unstamped conveyances, yet C. being a purchaser under these conveyances, had equal equities with the grantees *pendente lite*, and being in possession would not be disturbed. 4. That the purchasers *pendente lite* simply acquired the subject-matter of the suit and

MISTAKE. *Continued.*

the decree would be the same as though the original parties remained the same. 5. That the possession of the mine by the defendants at the time of the purchase *pendente lite* was notice of whatever legal or equitable rights the defendants had. *Id.*

11. *No such mistake as to warrant relief.*—Upon the whole record, *held*, that there is no such mistake shown as to entitle the complainant to the relief sought at the hands of a court of equity. *Id.*

See FRAUD, 1.

MORTGAGE.

1. *Defendant debtors seeking equity* at the hands of the court must do equity; viz., they must pay the money honestly due the complainants. *New Jersey Co. v. Ames*, 437

2. *Account against mortgagor and his co-tenants.*—Mortgagee of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the other tenants in common. *Bentley v. Bates*, 525

3. *Dissolution need not be prayed for.*—On a bill for an account of the dealings and transactions of a mining partnership it is not necessary to pray for a dissolution of the concern. *Id.*

4. *Mortgagee can not open mines—Accounting.*—A mortgagee in possession who had opened and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses. *Thornycroft v. Crockett*, 529

5. *Deed proved mortgage, by parol.*—A deed absolute on its face may be shown to have been intended only as a security; not by parol evidence merely of the agreement at the time, but by clear proof *dehors* of facts and circumstances which are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended. *Blackwell v. Overby*, 531

6. *Application of the rule to the facts.*—A made a conveyance to B and C, absolute on its face, of his interest in a gold mine for \$40, when it was shown to be worth \$400. A at the time was in great distress for money; the alleged price was not paid at the execution of the deed, nor any security given for it; upon a sale by B and C, within a short period, they accounted with A for a part of the proceeds; A remained in possession after the alleged sale, working the mine, as before; A asserted, in the presence of B and C, that he had made the deed to B and C in trust, and they did not deny it. *Held*, that these facts were clear proof that the deed was intended as a security merely. *Id.*

7. *Dissolving injunction on denial of bill—Mortgagor of quarry may work.*—Injunction against a mortgagor restraining him from quarrying on a quarry lot, half of which had been conveyed as such to him by the mortgagee, and to secure the consideration for which conveyance the mortgage was given—*dissolved* on answer denying the charges in the bill, which charges intimated that the defendant was impairing the value of the mortgaged premises and endangering the security. *Vervalen v. Older*, 540

8. *Extrinsic evidence to explain deed.*—For the purpose of applying the instrument to the facts, and determining what passes by it and who

MORTGAGE. *Continued.*

takes an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence. *Hancock v. Watson*, 546

9. *Absolute deed with written defeasance—Effect of transfer of mortgage.*—The conveyance of an interest in a mining claim by a deed absolute in form, will constitute a mortgage if the grantor at the same time take back a written defeasance, and if the grantee re-convey the premises such conveyance will constitute an assignment of the mortgage. *Halsey v. Martin*, 549

10. *Equity of redemption subject to sale.*—The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Id.*

11. *Foreclosure and not sale* is the remedy of an equitable mortgagee of a share in a mining partnership. *Redmayne v. Forster*, 551

12. *Pre-emption arrangement between partners—Account with foreclosure.*—The articles of a mining partnership empowered any partner to sell or dispose of his shares but gave a right of pre-emption to the other partners. R., one of the partners, made an equitable mortgage of his shares, which was assented to by the other partners, and afterward sold the shares to M., one of the company. *Held*, that all the partners were necessary parties to a suit for the foreclosure of the mortgaged shares; that in default of redemption by M., the other partners were entitled to take the mortgaged shares on payment of the mortgaged debt; that in default of redemption by M. or the other partners, the mortgagee was entitled to foreclosure and to an account of the profits of the partnership, made after the filing of the bill, and of the existing debts and liabilities of the partnership, and to have the share of such debts and liabilities attributable to the mortgaged shares, ascertained. *Id.*

13. *Chattel mortgage by corporation against public policy.*—The act of January 11, 1867, allowing mining corporations to mortgage their "property," does not allow them to execute a chattel mortgage of their personalty, such incumbrances being opposed to the policy adopted by the commonwealth upon the incumbrance of personal property. *Roberts' Appeal*, 560

14. *Burden of proof in case of fraud—Debt for valueless stocks.*—In a suit to foreclose a \$6,000 mortgage it appeared that \$1,000 of the debt was for mining stocks, which the defendant claimed were worthless, and which he testified the plaintiff agreed to take back at \$1,000. The plaintiff and another witness testified that the plaintiff's only representation as to the stock was that he had paid \$1,000 for it: *Held*, that the burden of proof to show fraud or misrepresentation was upon defendant, and having failed to show it, he could not have the \$1,000 deducted from the mortgage. *Renton v. Maryott*, 564

15. *Entry for condition broken—Effect upon intervening lease.*—It is in the power of the mortgagee, on entry for condition broken, where

MORTGAGE. *Continued.*

the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant. *Gartside v. Outley*, 566

16. *Attacking decree and sale collaterally.*—The regularity of a decree and sale of mortgaged premises can not be attacked in a collateral proceeding; it must be done by a direct proceeding instituted for the purpose. *Id.*

17. *Deed and title bond construed as mortgage.*—Tubbs conveyed to Walker his interest in certain mining property, and the next day Walker executed a title bond to Tubbs, binding himself to re-convey after he took from the mine the amount of a certain note. *Held*, that the deed and bond together amounted to a mortgage, and that Walker as mortgagee in possession was bound to reconvey as soon as his debt was satisfied. *Walker v. Tiffin Co.*, 572

18. *Decree should not extend beyond the case made in the bill.*—Upon bill to set aside a deed, or procure a release of mortgage, if there is nothing in the case to show that the defendant has no other interest in the property than that which he acquired by such deed or mortgage, it is error to decree an absolute release which may operate against another estate acquired by the defendant; and where it is not shown by the bill that complainant is entitled to the possession of property, it is error to award such possession. *Id.*

19. *Finding not disturbed.*—A finding that a bill of sale was intended as a mortgage will not be disturbed on appeal when the evidence is conflicting. *Sharpe v. Arnott*, 580

20. *Peculiar instrument construed as mortgage.*—A., who was indebted to both G. and S., conveyed an interest in a mining claim to G., by bill of sale, in which it was stipulated that G. should pay the debt to S. "as fast as it comes out of the claim, after deducting three dollars a day for living, for each day's work." *Held*, that the instrument was intended as a mortgage, and a decree was directed enforcing the lien of S., although G. had not realized three dollars per day from the claim. *Id.*

21. *Power of corporation to mortgage its property.*—Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money, or their debts. This power was abridged in New York by the laws of 1848, and afterward modified by the laws of 1864, so as to permit a corporation to mortgage its real estate to secure the payment of its debts, but not merely to raise money to carry on its operations. *Carpenter v. Black Hawk Co.*, 582

22. *Disputing validity of mortgage—Estoppel.*—The fact that bonds secured by a mortgage upon the corporate property were used both to pay debts and also to carry on the business of the corporation, does not render the mortgage invalid. The corporation and its stockholders having enjoyed the benefits of such bonds, would be estopped from repudiating either the bonds or the mortgage. *Id.*

23. *Mortgage not void because it includes franchises.*—A corporation has no power to mortgage its franchises. But a mortgage upon corporate

MORTGAGE. *Continued.*

property which includes both the real estate and the franchises of the company will be valid as to the real estate, and simply inoperative as to the franchises. *Id.*

24. *No particular form required to create mortgage.*—There is no rule of law which requires a mortgage upon real estate to be in any particular form, and an instrument in form resembling a trust deed is in this case held to be a mortgage. *Id.*

25. *Mortgage of future real estate.*—A mortgage need not be confined to the present real estate of a corporation, but may include property to be afterward acquired. *Id.*

26. *Colorado real estate sold under power of sale in New York.*—It is no objection to a mortgage that it authorizes the sale of the mortgaged premises situate in Colorado, after certain specified notices in New York. The New York statutes relative to sales under power in mortgages do not apply to such a case; in the absence of statute the parties have the power to agree upon the manner of sale to realize the security. *Id.*

27. *Validity of mortgage under New York statute.*—Under the New York statutes it is not necessary to the validity of a mortgage that it should be given to some particular creditor to secure his debt. All that the statute requires is that the mortgage should be given to secure the payment of debts. It might be by a mortgage directly to the creditors, or to trustees for their benefit, or by a mortgage to secure bonds issued and delivered to the creditors, or sold to raise money to pay them. *Id.*

28. *Allowance to mortgagee for improvements and repairs.*—In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances;" but to entitle him to "permanent improvements" or "substantial repairs" he must make out a case for them at the trial. *Tipton Green Co. v. Tipton Moat Co.*, 591

29. *Stone severed after mortgage—Prior lien of workmen.*—After a decree for sale of mortgaged premises and execution issued thereon against the mortgagor, an insolvent incorporation, it quarried stone from the mortgaged premises, which stone remained on the premises. *Held*, that the stone was subject to the lien of the mortgage, but that under the circumstances it must be postponed to the lien for the quarrymen's wages. *Am. Trust Co. v. Belleville Co.*, 594

30. *Mortgagee allowing mortgagor to work a quarry as his own.*—*Held*, to have let in an intervening lien. *Id.*

31. *Mortgagor entitled to income of property.*—Until the mortgagee of a coal mine takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from operating the same. *Young v. Northern Ill. Co.*, 596

32. *Assignment of drafts—Advances on mine proceeds.*—The mortgagor, prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently, and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it

MORTGAGE. *Continued.*

had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank. *Id.*

33. *Idem—Conflicting equities of creditors.*—The fact that, at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank. *Id.*

34. *Reconveyance of title to mortgagee.*—S. held a deed of mining ground as a mortgage to secure an existing indebtedness; he conveyed the premises to P. and after two or more transfers of the title, the property was redeeded to S.: *Held*, that when the title returned to S. the same equities attached to it in his hands as existed at the time he made the conveyance to P. *Brophy Co. v. Brophy Co.*, 601

See DESCRIPTION, 1; MISTAKE, 1, 2.

NEGLIGENCE.

1. *Variance as to kind of negligence charged.*—Where the complaint avers neglect by failure to furnish suitable machinery, instructions based on negligence by the improper use or handling of machinery in itself safe, are not pertinent. *Berea Stone Co. v. Kraft*, 16

2. *Choice of instrumentalities*—Where safe and unsafe instrumentalities are at hand with which to perform a particular work, the adoption of the latter to the exclusion of the former is negligence. *Id.*

3. *Warning to deceased.*—To prove contributory negligence, it is competent to show that the deceased was warned to avoid the place where he was killed, and that he himself had conveyed this warning to others. *Lehigh Valley Co. v. Jones*, 30

4. *Conflicting evidence as to apparent danger.*—Where there was a conflict of testimony as to whether or not there was apparent danger in working under a scale, the court refused to disturb the verdict of the jury, finding no negligence on the part of a workman who ventured under it. *Lake Superior Co. v. Erickson*, 39

5. *Idem—Contributory negligence.*—It is not contributory negligence for an employe, who is in doubt about the safety of the place where he has to work, to defer to the opinions and assurances of those who are supposed to know, and from their position are bound to have special knowledge as to whether it is safe or not. *Id.*

6. *It is culpable negligence* to avoid keeping mining works as well protected as usual prudence would dictate. *Id.*

7. *Duty to tap roof.*—Instruction embodying duty of miner to tap the roof and judge of its safety, asked for by defendant, considered and approved. *Money v. Lower Vein Co.*, 56

8. *No implied knowledge of danger from contact of hot slag with water.*—The law will presume, within limits, that every one has knowledge of certain destructive forces in nature, and accepts employment with reference to them—as that fire will burn, water drown, the law of gravitation, etc. But many scientific facts tending to endanger life are not

NEGLIGENCE. *Continued.*

within the intelligence of ordinary men. A laborer employed to remove hot slag from a furnace in proximity to water, will not be presumed to know the dangers which may result from the explosion sure to be caused by the contact of hot slag and the water. *McGowan v. La Plata Co.*, 59

9. *Idem—Knowledge of facts and knowledge of implied dangers distinguished.*—It is not so much a question whether the party injured has knowledge of all the facts in his situation as whether he is aware of the dangers that threaten him. *Id.*

10. *Lessor not liable for surface injuries resulting from negligence of lessee.*—The defendants demised a coal mine with the usual covenants, reserving, amongst other things, the right to view and examine the mine, and to re-enter for non-payment, neglect, etc. During the term, plaintiff's house, built on the surface over the mine, was injured from negligent working of the mine: *Held*, that the lessors were not liable for the results of their tenants' negligence. *Offerman v. Starr*, 614

11. *Idem, as to licensor.*—There would be no difference in regard to the responsibility of defendants if the instrument were a license in terms. *Id.*

12. *Accident from reservoir in hands of contractor.*—Where parties employed architects, reputed to be skillful, to construct a dam of certain specified dimensions capable of resisting all floods and freshets for the period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water rushed down the channel, destroying, in its course, the store of plaintiffs, and the employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work: *Held*, that the contractors alone were liable. *Boswell v. Laird*, 616

13. *Idem—Respondent superior, when not to apply.*—The relation of the parties is that of independent contractors; the relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondent superior* does not apply to the case. *Id.*

14. *Liability of architect—Defects inherent in the plan or otherwise.*—The architects alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan. If the plan had been devised by the owners, and the builders simply engaged to carry it out, and the defects from which the injuries resulted had been inherent in the plan, then the former would have been liable to plaintiffs. *Id.*

15. *Proprietor not liable because accident happened on his premises.*—Where the enterprise undertaken is a lawful one, and is intrusted to competent and skillful architects, the mere fact that the improvements are erected upon the land of the proprietor is no just reason why liability should attach to him, during its progress, any more than if such enterprise be executed elsewhere. *Id.*

16. *Ditch flooding ditch—Sufficiency of complaint.*—Form of complaint in case of ditch flooded by another ditch given in full as sustained by the court of review. *Tuolumne Co. v. Columbia Co.*, 634

17. *The owner of a ditch is bound to use that care and caution in con-*

NEGLIGENCE. *Continued.*

structing and maintaining it which an ordinarily prudent man would use if all the risk were his own. *Wolf v. St. Louis Co.*, 636

18. *Negligence in such case a question of fact.*—The degree and fact of prudence must depend upon the particular circumstances of each case; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross, or even criminal negligence. *Id.*

19. *Injury from falling bucket—Presence of master—Working after knowledge of danger.*—Plaintiff, a workman employed in sinking a pit, was injured by the fall of a tub filled with water. Evidence was given that the hoisting tackle was defective, not being fitted with a safe hook, and that the jiddy should have been used for hoisting the water as well as the earth. The master was at the works several times each day. *Held*, that the master was not liable, the plaintiff himself having attached the bucket to the hook and the plaintiff's fellow workmen having neglected to use the jiddy. *Griffiths v. Gidlow*, 640

20. *Acquiescence in known neglect of fellow servant.*—When a servant is injured or killed while in the employ of his master, by an accident resulting from the habitual negligence of his fellow servants, known and acquiesced in by the master, the master is not liable to an action by the servant, or, if he be killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. *Senior v. Ward*, 646

21. *Idem.*—Unless there be such contributory negligence by the servant, the master is liable. *Id.*

22. *No defense that injury could have been prevented by the commission of a trespass.*—In an action for flooding a mining claim the fact that plaintiffs could have avoided the injury by pulling off a board from defendant's flume, thus diverting the water, is no defense. They could have done so only by the commission of a trespass, and are not to be denied redress because they appeal to the law rather than violate it. *Wolf v. St. Louis Co.*, 653

23. *Injuries to garden by breaking of reservoir—Degree of negligence—Error in instruction cured by explanation.*—In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that, to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of the plaintiff been their property; and that otherwise they had been guilty of gross negligence, and were liable in damages: *Held*, that although the instruction without the explanation was wrong, still, with the explanation, it was right and could not have misled the jury. *Todd v. Cochell*, 655

24. *Careless management of water ditch.*—In an action for injury to land by reason of the alleged careless management of defendant's water ditch, the rule applicable is, that "defendant is bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs." *Campbell v. Bear River Co.*, 656

NEGLIGENCE. *Continued.*

25. *Coal dirt in stream—Contribution to injury.*—A dam was filled by deposits of coal dirt from different mines on the stream above the dam, some worked by defendants and their tenants, and others by persons entirely unconnected with the defendants. The court charged that if, at the time the defendants were throwing coal dirt into the river, the same thing was being done at other collieries, and they knew of it, they were liable for the combined results of all the deposits. *Held*, erroneous. The ground of the action is not the deposit of the dirt in the dam by the stream, but the negligent act above. The liability of the defendants began with their own act on their own land, and being several when committed, did not become joined because its consequences united with other consequences. *Little Schuylkill Co. v. Richards*, 661

26. *Tort of lessees.*—Lessors are not liable for the wrongful acts of the lessees of their mines not done by their authority or command. *Id.*

27. *Rule as to corporate liability.*—In an action by an employe of a corporation for injuries occasioned by the explosion of two oil stills in the refinery of the company: *Held*, that the officer having charge of the business must for all practical purposes be regarded as the corporation itself, and that the same rule of liability must be applied to corporations as to natural persons. *Ardesco Co. v. Gilson*, 669

28. *Duty to employes—Safe machinery.*—Employers owe to their servants and workmen the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and employing with them fit and competent superintendents and fellow workmen. *Id.*

29. *Employment of competent persons.*—If a person employs mechanics or contractors in an independent business, and they are of good character, and there was no want of care in choosing them, he is not liable for injuries to others from their negligence or want of skill. *Id.*

30. *Idem—Boiler explosion.*—If one employs a reputable machinist to construct a steam engine and it blows up from bad materials or unskillful work, the employer is not responsible for injury to his own servant or to a third person. *Id.*

31. *Machinery built on employer's own plan.*—The rule is different if the machine is made according to the employer's own plan, or he interferes and gives directions as to its manner of construction. *Id.*

32. *There is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill.* *Id.*

33. *What is due care and ordinary diligence* depends much on the kind of business and the sort of material handled. *Id.*

34. *Dangerous shaft—Pleading and proof—Immaterial variance.*—In an action for injuries received by plaintiff while in defendant's employ in digging a shaft, the complaint avers, as a consequence of the careless manner in which the shaft was constructed, and the neglect of defendant in not planking or properly securing the sides thereof, without any fault on plaintiff's part, that the sides of the shaft fell in upon him. It further avers that defendant, well knowing the premises and knowing the danger of said shaft to those employed therein, negligently, etc., directed plaintiff

NEGLIGENCE. *Continued.*

iff to proceed to the bottom thereof and dig there, without advising him of the danger, etc. The negligence shown by the proof was, that defendant, being aware of the existence of a fissure in the side of the shaft, at a point where it caved in, neglected to inform the plaintiff of it. *Held*, that the cause of action proven was *substantially* alleged in the complaint, or the variance did not mislead the defendant, and might be disregarded.

Strahlendorf v. Rosenthal,

676

35. *Evidence of employer's knowledge of danger*.—Admissions made by defendant to several persons on different occasions, to the effect that he knew of the existence of a fissure in the walls of the shaft, before plaintiff went down, and knew it was dangerous, but thought it would hold until he got through: *Held*, sufficient evidence to justify the submission of the question of his negligence to the jury. *Id.*

36. *Idem*—*Contributory negligence*—*Question for jury*.—The question of contributory negligence was for the jury, and was properly submitted to them by the court. *Id.*

37. *Neglect of statutory mine regulations*.—Where a mining company failed to comply with the terms of the act of 1872, which required the top of each shaft to be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft, as a result of which an employe, using due care, fell into a shaft and was killed: *Held*, that the company was liable in an action on the case brought by his personal representatives. *Bartlett Co. v. Roach*,

682

38. *Neglect of company and that of co-employe distinguished*.—The failure of a company to comply with a statutory requirement which results in injury to the employe, distinguished from cases where injury is the result of negligence of a co-employe. *Id.*

39. *Alleged variance—Attempt to escape after warning*.—Upon a count alleging death as the result of there being no cover to the cage, while deceased was on the cage, where the proof showed that immediately after the accident he was found lying on his back, off the cage, with his feet about six inches from it, it was *held*, that as a matter of fact this evidence did not prove that he was off the cage when struck, but that even if he was in the act of getting off the cage upon the alarm given that the coal which killed him was falling, such fact would not constitute a variance between the averment and the proof. *Litchfield Co. v. Taylor*,

685

40. *Willful injury excuses contributory negligence*.—Where death to a miner has resulted from the willful conduct of a company in failing to use a covered cage, in known violation of the plain requirement of the statute, a verdict against the defendant is justified, although the deceased may not have been entirely free from fault. *Id.*

41. *Facts not amounting to contributory negligence*.—The fact that deceased may have been heard to say in conversation with strangers, that he preferred to be hoisted in an uncovered cage, or the fact that he went on the cage before the signal was given, when the man in charge of the cage had made no remonstrance, and the deceased and his comrades supposed the signal had been given, do not show that the misconduct of the deceased materially contributed to the injury. *Id.*

NEGLIGENCE. *Continued.*

42. *Competency of engineer, a question of fact.*—In an action for injuries caused to a miner while being lowered into a mine, it is error for the court to instruct the jury that the employment of a person as engineer who has always been a laborer or a mule driver, raises a presumption of negligence. What constitutes negligence in the employment of an incompetent engineer is entirely a question of fact for the jury. The court should only lay down the law as to the liability of the defendant in case of such negligence, without intimating any opinion in regard to the force of the evidence. *Joch v. Dunkwardt*, 690

43. *Subsidence of land—Smoke from coke ovens.*—Where land is injured by negligence in mining coal underneath it, or the crops and vegetation thereon are injured by the heat and smoke from coke ovens, the owner is entitled to a verdict for such damages as the jury believe from the evidence he has thereby sustained. *Brown v. Torrence*, 692

44. *Coal owner required to leave pillars although released from injuries resulting from mining.*—One who conveys land to another reserving the right to remove the underlying coal, is bound to exercise ordinary care in the removal, and if necessary to leave pillars or ribs of coal to support the surface of the soil, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations. *Livingston v. Moingona Co.*, 696

See ACCIDENT, 1, 2; EVIDENCE, 1; MASTER AND SERVANT; MISTAKE.

NOTICE—See POSSESSION, 2.

NUISANCE—See NEGLIGENCE, 43.

OIL—See MEASURE OF DAMAGES, 34, 48; MISTAKE, 7.

ORE—See MISTAKE, 1-4.

PARTIES.

1. *Amendment by adding plaintiffs.*—The action to recover damages for the death of the miner was brought by his widow, within a year, as required by the act of assembly. After the expiration of the year it was amended so as to bring in the children as plaintiffs, but no new cause of action was introduced. *Held*, that this amendment was properly allowed. *Delaware Co. v. Carroll*, 48

2. *Widow substituted for administratrix as plaintiff.*—An action to recover damages for the death of a miner, caused by neglect to observe the provisions of the statute relating to miners, is properly brought by the widow of the deceased. The action is given to the widow and not to the personal representative. *Litchfield Co. v. Taylor*, 684

See AMENDMENT, 1; EXECUTORS, 1; MORTGAGE, 2; PATENT, 3.

PARTNERSHIP—See MORTGAGE, 12.

PARTITION.

1. *Partition—Void decree as evidence of.*—A decree of court, though void for want of parties and for other reasons, if subsequently acted on, may possibly be treated as evidence of partition, according to the terms of such decree. *Kinney v. Consolidated Va. Co.*, 457

PATENT.

1. *Patent can not be collaterally attacked for fraud.*—A patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land. It can not be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant or in the proof of its execution, or in the making of the survey. *Boggs v. Merced Co.*, 334

2. *Patent conflicting with vested rights.*—Individuals can only resist the conclusiveness of a patent by showing that it conflicts with prior vested rights, and even then the patent would only be inoperative to the extent of such conflict, not void. *Id.*

3. *Parties in bill to set aside patent.*—It is a fatal objection to a bill in equity to set aside a patent for fraud in its procurement that the patentee is not a party. *Id.*

4. *Patent, how annulled.*—To annul a patent absolutely, proceedings can only be taken by the government or some individual in its name, and that by *scire facias*, or by bill, or information. *Id.*

See MEXICAN GRANT, 3; MINERAL LANDS.

PERSONAL LIABILITY.

1. *Trustee of stock—Liability—Witness.*—A person who holds stock upon the books of a water company and holds an office, viz., that of secretary, to which stockholders only are eligible, although he holds the stock only in trust for another, is responsible for the debts of the company, as a stockholder, and therefore disqualified as a witness for the company. *Wolf v. St. Louis Co.*, 653

PERSONAL PROPERTY.

1. *When severance complete.*—It is not to be considered as severed from the mass until it exists as the coal of commerce. *McLean Coal Co. v. Lennon*, 277

PLACERS—See LODE, 1.

PLEADING AND PRACTICE.

1. *Directing verdict for defendant.*—If the evidence in any case, when taken in the strongest light for the plaintiff, would yet be insufficient to support a verdict in his favor, the court should direct a verdict for the defendant. *Kielley v. Belcher Co.*, 11

2. *Statement sent out with jury.*—It was not error, where there was evidence of increased value to the premises by reason of the machinery and improvements, to permit the defendants to send out a statement with the jury. *Ege v. Kille*, 213

3. *Point not argued below.*—When the question of "way-leave" was not argued before the first division of the Court of Session, it will not be entertained in the House. *Livingstone v. Rawyards Co.*, 291

4. *Void decree.*—In an action by parties in possession of a mining claim against parties out of possession, brought under a Nevada statute to determine an adverse claim, the complaint merely alleged title and

PLEADING AND PRACTICE. *Continued,*

possession in plaintiffs and an adverse claim by defendants, and the plaintiffs obtained a decree. At a subsequent term, a supplemental decree, purporting to be by consent, was rendered, adjudging the title to the north twenty feet of the claim to be in two of the plaintiffs, and that the title to the balance should remain the property of all the plaintiffs according to their respective rights. *Held*, that the supplemental decree was void because: 1, there was no allegation in the complaint as to the rights of one plaintiff against the others; 2, three of the co-tenants were not parties to the suit; 3, the decree was rendered after the adjournment of the term, and after the rights of the parties had been fully adjudicated. *Kinney v. Consolidated Va. Co.*, 457

5. *Pleading after rule day*.—If a rule to plead expires in term time, a pleading may be interposed at any time before application for default. *Walker v. Tiffin Co.*, 572

6. *Idem*.—*It is otherwise when the rule expires in vacation*.—In that case the defendant must plead within the time specified, and a demurrer filed after the rule day may be stricken from the files, and the bill taken as confessed. *Id.*

7. *Demurrer overruled*.—*Error without prejudice*.—Although the court below erroneously overruled the plaintiff's demurrer to the affirmative matter set up in the defendant's answer, yet, because the defendant offered no proof in support of such affirmative matter, the plaintiff was not prejudiced thereby and the judgment will not be reversed. *Campbell v. Bear River Co.*, 656

8. *Sending out papers with jury*.—As a general rule, with some exceptions, the sending out of papers with the jury is regulated by the sound discretion of the court trying the case. *Little Schuylkill Co. v. Richards*, 661

See APPEAL; EJECTMENT; LICENSE, 1; MEASURE OF DAMAGES, 29; MORTGAGE, 18, 19; NEGLIGENCE, 23; WAIVER, 1.

POLLUTION OF STREAMS—See NEGLIGENCE, 25.

POSSESSION.

1. *Possession of surface owner extended to mines, after severance*.—Where plaintiff's ancestor had severed and sold a clay bank which was afterward abandoned by his grantee: *Held*, that "the possession of the surface which the plaintiffs then had would thereafter extend to the clay pit." *Stratton v. Lyons*, 314

2. *No constructive notice from possession retained by grantor*.—The continued possession of a mining claim by the grantor after he had conveyed the legal title, would not be notice to a subsequent purchaser of any unrecorded defeasance held by such grantor. (HAWLEY, J.) *Brophy Co. v. Brophy Co.*, 602

See ACCOUNT, 1; EJECTMENT, 3.

PRESUMPTION—See MEASURE OF DAMAGES, 2.

PROSPECTING CONTRACT—See MEASURE OF DAMAGES, 12.

PUBLIC DOMAIN.

1. *The rights of the miners in California.*—There was never (prior to 1866) any license from the government to the miners on the Pacific Coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government. In controversies between parties on government land, where neither have absolute rights, the presumption of a grant to the first appropriator is simply a rule of convenience, having no place for consideration as against the superior proprietor. *Boggs v. Merced Co.*, 335

2. *Government entry upon private lands.*—The United States could not enter nor authorize an entry upon private property for the purpose of extracting minerals. The United States, like any other proprietor, could only exercise the rights to the minerals in private property in subordination to such rules and regulations as the local sovereign might prescribe. *Id.*

QUARRIES—See MINES, 3, 6, 7; MINERALS; MORTGAGE, 7; WASTE, 3.

RAILROADS—See MINERAL LANDS, 3.

RECEIVER.

1. *Order appointing receiver—When not reviewed.*—An order made after final judgment directing a receiver to pay over profits to the prevailing party, is a proceeding auxiliary to a suit to recover the premises, and on appeal from such an order the Supreme Court will not review the order appointing the receiver. *Whitney v. Buckman*, 428

2. *Property in hands of receiver—Presumptions.*—It is not error for a court to refuse to have issues framed and submitted to a jury to ascertain the value of property put into the hands of a receiver, and the ownership thereof. It will be presumed that the judge informed himself as to what he placed in the hands of the receiver, and it will not be presumed that the referee transcended his authority. *Id.*

RECORD—See MINERAL SPRINGS, 1.

1. *A secret equity* (as against third parties) can not be maintained in face of the statute requiring the record of assignments. *Strout v. Natoma Co.*, 330

2. *Idem—Unrecorded assignment of stock.*—The books of the corporation must constitute the test of the rights of third parties. *Id.*

RENTS AND ROYALTIES—See LEASE; MEASURE OF DAMAGES, 9, 11; MORTGAGE, 31.

RESCISSION.

1. *Statu quo.*—A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this can not be done it will give such relief only where the clearest and strongest equity imperatively demands it. *Grymes v. Sanders*, 445

See LACHES, 1; MEASURE OF DAMAGES, 47.

RESERVATION—See MINES, 8.

SALE—See MEASURE OF DAMAGES, 45-47; STOCK, 1.

SEVERANCE—See MEASURE OF DAMAGES, 75; POSSESSION, 1; PERSONAL PROPERTY, 1.

STATUTE OF LIMITATIONS.

1. *Burden on defendant.*—So long as a wrongful working is to be treated as inadvertent the Statute of Limitations applies, and an account will be restricted to six years prior to the going of the writ; but the *onus* was, in this cause, put upon the defendant to show that the minerals gotten by him during the interval in controversy were gotten before the six years. *Trotter v. Maclean*, 263

2. *Foreign corporation.*—A foreign mining corporation can not plead the Statute of Limitations in Nevada. *Robinson v. Imperial Co.*, 371

3. *Construction of Nevada Limitation Act.*—Section 21 of the Statute of Limitations, in the expression "cause of action," includes real as well as personal actions. *Id.*

STOCK.

1. *Caveat emptor applied to sale of stocks.*—The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. *Renton v. Maryott*, 564

See MEASURE OF DAMAGES, 36, 37, 63; MERGER, 4; MORTGAGE, 14; PERSONAL LIABILITY, 1; RECORD, 2; WITNESS, 2.

SURFACE SUPPORT—See NEGLIGENCE, 43, 44.

SURVEY—See AGENT, 4; BOUNDARIES, 3; MEXICAN GRANT, 1, 2.

TAX.

1. *Foreign miners' tax.*—The Revenue Act of 1860, which declares that no person who is not a citizen of the United States, or who has not previously declared his intention to become such, shall be allowed "to take gold from the mines of this State," without a license: *Held*, to refer only to public lands of the State or United States, and not to the private property of individuals. *Ah He v. Crippen*, 367

See EMINENT DOMAIN, 1.

TENANT FOR LIFE—See WASTE, 1, 2.

TENANT IN COMMON—See MORTGAGE, 2.

TORT—See EXECUTORS, 1.

TOWN SITE—See CONVEYANCE, 1.

TRESPASS—See EXECUTORS, 1; MEASURE OF DAMAGES; NEGLIGENCE, 22.

TROVER.

1. *The finder of a jewel may maintain trover for conversion thereof by a wrongdoer.* *Armory v. Delamirie*, 66

See MASTER AND SERVANT, 23; MEASURE OF DAMAGES, 19, 52-53, 70.

TRUST—TRUSTEE—See PERSONAL LIABILITY, 1.

VARIANCE—See NEGLIGENCE, 1, 34, 39.

VENDOR AND PURCHASER.

1. *The bona fide purchaser of a legal title is not affected by any latent equity of which he has no notice, actual or constructive.* *Brophy Co. v. Brophy Co.*, 602.

2. *Payment of purchase money before notice of outstanding equities.*—A mining claim was purchased for one thousand dollars in coin, and fifteen thousand shares of stock in a corporation thereafter to be formed. The money was paid, but only a portion of the certificates for shares of stock were delivered to the grantor before the purchaser received notice of the equities of plaintiff: *Held*, that the purchase money was paid before notice. *Id.*

3. *Maxim "sic utere, etc.," applied.*—Without a contract or some relation of privity as to the use to be made of land sold, the vendee stands to his vendor just as he does to others, and the maxim applies, *sic utere tuo ut alienum non lædas.* *Brown v. Torrence*, 692

See LACHES, 2; MEASURE OF DAMAGES, 25-28, 30; RESCISSION, 1.

VENTILATION.

1. *Ventilation.*—Method of, described. *Lehigh Valley Co. v. Jones*, 80

VERDICT.

1. *Verdict not disturbed when evidence conflicting.*—When a motion for a new trial has been overruled by the court below, the presumption is that the opinions of the judge and jury harmonize in support of the verdict, and when in such a case the evidence is conflicting the Supreme Court would not be justified in setting the verdict aside. *Antoine Co. v. Ridge Co.*, 97

See PLEADING AND PRACTICE, 1.

WAIVER.

1. *Waiver of exceptions.*—When an amended declaration is withdrawn, a bill of exceptions to evidence offered under it falls with it. *Lyon v. Miller*, 85

See LACHES, 1.

WATER—See MILL SITE.

WASTE.

1. *Right of tenant for life to mine coal.*—Prior to the beginning of a life estate in certain coal lands, coal had been taken and used for domestic purposes from an opening where the coal out-cropped, but it had never been mined for market. *Held*, that the tenant for life could not mine the coal for sale, but only for the purpose for which it had previously been mined. *Franklin Co. v. McMillan*, 224

2. *Tenant for life may exhaust open mines.*—A tenant for life, when not precluded by restraining words, may work open mines to exhaustion. *Westmoreland Co.'s Appeal*, 394

3. *It is not waste to properly work a quarry.* *Vervalen v. Older*, 540

WITNESS.

1. *Interested witness*.—A witness can not purge himself of interest by his own *voir dire*. *Pittsburg Co. v. Foster*, 116
 2. *A stockholder who has parted with his stock* before suit brought is disinterested, and therefore a competent witness for the company. *Tuolumne Co. v. Columbia Co.*, 634
- See PERSONAL LIABILITY, 1.

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